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v.
Michael D. Ray, et al.

Docketed:
November 13, 1990

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Ray,Michael D.

111390 S.G.'s sec states respond shld be as above

Entry	Date	Note	Proceedings and Orders
1	Nov 13 1990	G	Petition for writ of certiorari filed.
3	Dec 10 1990		Order extending time to file response to petition until January 23, 1991.
5	Jan 23 1991	X	Brief of respondents Michael D. Ray, et al. in opposition filed.
4	Jan 30 1991		DISTRIBUTED. February 15, 1991
6	Feb 8 1991	X	Reply brief of petitioner United States filed.
8	Feb 15 1991		REDISTRIBUTED. February 22, 1991
10	Feb 25 1991		REDISTRIBUTED. March 1, 1991
11	Mar 4 1991		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
13	Apr 18 1991		Brief of petitioner United States Dept. of State filed.
14	Apr 18 1991		Joint appendix filed.
12	Apr 19 1991		Lodging recd.
16	May 8 1991		Order extending time to file brief of respondent on the merits until June 14, 1991.
17	Jun 14 1991		Brief amici curiae of ACLU, et al. filed.
18	Jun 14 1991		Brief amici curiae of American Newspaper Publishers Assn., et al. filed.
19	Jun 14 1991		Brief of respondents Michael Ray, et al. filed.
21	Jun 14 1991		Brief amici curiae of Lawyers Committee for Human Rights, et al. filed.
20	Jun 18 1991		Lodging received (3 copies).
22	Jul 12 1991		CIRCULATED.
23	Jul 17 1991	X	Reply brief of petitioner United States Dept. of State filed.
24	Jul 19 1991		SET FOR ARGUMENT WEDNESDAY, OCTOBER 9, 1991. (2ND CASE)
25	Sep 20 1991		Copies of Third Circuit decision received from the Solicitor General and distributed.
26	Sep 23 1991		Record requested.
27	Oct 1 1991		Record filed.
		*	Box-Original proceedings U.S.Dist. Ct., S. District of Florida and U.S. Court of Appeals, Eleventh Circuit.
28	Oct 9 1991		ARGUED.

90-747

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF STATE, PETITIONER

v.

MICHAEL D. RAY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

In this case under the Freedom of Information Act (FOIA), 5 U.S.C. 552, respondents seek to obtain names and other information that would identify Haitian citizens who were interviewed, on a confidential basis, by State Department personnel in Haiti in the course of monitoring the Haitian Government's compliance with its agreement not to persecute persons returned to that country by the United States. The questions presented are:

1. Whether the names and other information identifying the individual Haitian citizens who consented to be interviewed by State Department personnel are protected against mandatory disclosure by FOIA Exemption 6, which applies to matters "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).

2. Whether the district court erred in refusing to consider the merits of the State Department's submission that the names and other identifying information also are protected by FOIA Exemptions 1 (classified information) and 7(C) and 7(D) (law enforcement information), because the State Department did not classify the information and invoke Exemptions 1, 7(C) and 7(D) until after the district court had denied the Department's motion for summary judgment based on Exemption 6 and ordered it to disclose the identities of the interviewees.

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No.

UNITED STATES DEPARTMENT OF STATE, PETITIONER

v.

MICHAEL D. RAY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the United States Department of State, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 908 F.2d 1549. The orders of the district court (App., *infra*, 25a-30a, 31a-33a) are reported at 725 F.Supp. 502 and 505.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1990, and a petition for rehearing was denied on October 12, 1990. App., *infra*, 34a-35a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Freedom of Information Act, 5 U.S.C. 552, are reproduced at App., *infra*, 38a-39a.

STATEMENT

1.a. Respondent Michael Ray, a lawyer, brought this action under the Freedom of Information Act (FOIA), 5 U.S.C. 552, on his own behalf and on behalf of three Haitian nationals seeking political asylum in the United States. Second Amended Complaint ¶¶ 3, 4 (R1:36).[1] Respondents had filed FOIA requests with the Department of State seeking records of investigatory trips to Haiti made by federal personnel. *Id.* ¶ 41. The State Department released 25 documents, but deleted from 17 of those documents names and other information that would identify individual Haitians who had been interviewed by State Department personnel. The State Department initially withheld that information under Exemption 6, 5 U.S.C. 552(b)(6), which provides that the FOIA "does not apply to matters that are * * * personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." App., *infra*, 26a.

The State Department filed a motion for summary judgment on the Exemption 6 claim, supported by the declaration of John Eaves, the Acting Deputy Director of the Office of Mandatory Review of the State Department's Classification and Declassification Center. R3:52, Exh. A. ¶ 1. Mr. Eaves explained that the 17 documents are reports from Haiti of confidential interviews by State Department personnel of Haitian nationals who had been returned to Haiti following unsuccessful attempts to enter the United States without documentation. The interviews were conducted to determine whether the individuals had been mistreated by Haitian authorities upon their return. *Id.* ¶¶ 8, 10. Respondents alleged that they needed the information for use in ongoing deportation and asylum proceedings, in order to assist them in showing that *they* would be subject to persecution if returned to Haiti. App., *infra*, 3a-4a. Mr. Eaves explained that the State Department had released the substance of the reports in their entirety and that the names and other identifying information were withheld "to protect the privacy of Haitians who consented to interviews by Embassy officers" (Eaves Decl. ¶ 8):

> While no evidence of harassment or other ill treatment of the returned Haitians was reported, those who were interviewed consented to the procedures with the understanding that their conversations with Embassy officers would be conducted under conditions of privacy and confidentiality. To disclose the identities of these individuals would not only betray their trust in our discretion, it would also subject them or their families to possible embarrassment in their social and community relationships. This would be a clearly unwarranted invasion of the privacy of the individuals concerned.

b. On March 3, 1989, the district court issued a memorandum order on pending motions. That order, *inter alia*, rejected the State Department's submission that the identities of the interviewees were properly withheld under FOIA Exemption 6. App., *infra*, 25a-30a. The court noted that in determining whether disclosure would result in a clearly unwarranted invasion of personal privacy, it was required to "employ a balancing test, weighing an individual's right of privacy against the public right to disclosure of government information." *Id.* at 28a. Treating "[t]he promise of confidentiality by the State [Department]" as "only one factor to be considered," the court found the privacy interests at stake in this case to be "de minimis and little more than speculation." *Id.* at 29a. On the other side of the balance, the court found that "this country's immigration policy supports a finding

[1] "R1" refers to the first volume of the record certified by the district court to the court of appeals. "36" refers to the document number provided by the district court.

that the public has a legitimate interest in the safe relocation of returned Haitians." *Ibid.* Without explaining how this supports public disclosure of information obtained on a confidential basis to assure a candid assessment of Haiti's conduct, the court concluded that the balance "tilts" in favor of public disclosure of the names and other information identifying the individual Haitians who had consented to be interviewed. *Ibid.* The court therefore ordered the State Department to release that information within 15 days, although it withheld entry of final judgment until after expiration of the 15-day period. *Ibid.*[2]

2.a. After the district court ordered release of the names, the State Department immediately instituted a review of the sensitive nature of that information and the consequences of public disclosure. See page 26, *infra*. On March 17, 1989, the State Department moved for reconsideration,[3] arguing that the identities of the Haitian nationals are protected not only by FOIA Exemption 6, but also by Exemptions 1, 7(C) and 7(D), 5 U.S.C. 552(b)(1), (7)(C) and 7(D). Those exemptions provide that FOIA does not apply, respectively, to matters that are properly classified pursuant to Execu-

[2] Respondents also sought to obtain an alleged list of 600 individuals who had been returned to Haiti and had not been persecuted. The State Department and Immigration and Naturalization Service concluded that no such list existed, and both courts below found their searches adequate. *Id.* at 16a-20a, 26a-27a. In addition, respondents requested the district court to certify a class of all black Haitian citizens in exclusion and deportation proceedings who would present asylum claims and to enjoin those proceedings until six months after respondents obtained the information they sought under the FOIA. The district court, affirmed by the court of appeals, refused to certify a class and dismissed respondents' non-FOIA claims. App., *infra*, 5a, 15a-16a, 21a-24a, 29a n.3, 36a-37a. Those issues are not involved here.

[3] Although the district court had withheld entry of final judgment, App., *infra*, 29a, the motion was styled a Motion to Alter or Amend Judgment and was filed pursuant to Fed. R. Civ. P. 59(e). R4:86, at p. 1.

tive Order of the President or to law enforcement information the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy or to disclose a confidential source.

The motion for reconsideration was supported by the declaration of Richard H. Melton, the Deputy Assistant Secretary of State for Inter-American Affairs. R4:88. He stated that on September 23, 1981, the United States, pursuant to Executive Order of the President, had entered into an agreement with the Government of Haiti to reduce illegal migration of Haitians to the United States. *Id.* ¶¶ 3, 4; see Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981). He continued (Melton Decl. ¶ 3):

> That agreement provided for various cooperative law enforcement measures, including the interdiction by U.S. Government authorities of Haitian flag vessels on the high seas, inquiries regarding the status of those on board, and the return of the vessels and persons aboard to Haiti if a violation of U.S. or Haitian law is discovered. The agreement included an undertaking by the Government of Haiti not to prosecute for illegal departure any of the returnees who are not traffickers. The U.S. Government stated its intention in the agreement not to return any Haitian migrants "whom the United States authorities determine to qualify for refugee status." [4]

Mr. Melton also explained why the interviews "were conducted with the clear understanding that they would be held confidential" (Melton Decl. ¶ 7; see *id.* ¶ 10):

> If Haitians had been aware that their names and interview statements could be made public and

[4] The declaration (¶ 7) described the interview process: When a vessel was interdicted and it was ascertained that the persons on board did not have a bona fide claim to refugee status, the vessel and its passengers were returned to Haiti. Upon arrival at Port-au-Prince, a U.S. Embassy official obtained the names and addresses of all returnees. State Department personnel then conducted a follow-up interview of a representative sample of the returnees, usually about six months later. Approximately 27% of the returnees were located and agreed to be interviewed.

> might be used in political asylum proceedings, either on behalf of or against fellow Haitians, the interviewees might have been far less candid in nature. Had the U.S. government not been able to assure confidentiality of the names of interviewees, the United States would have been severely handicapped in its ability to obtain the information necessary to assess the success of its agreement with Haiti and the interdiction program.

More generally, Mr. Melton explained that without the "essential trust" that the United States will "protect the identity of sources of information, * * * [o]ther Haitians or third country nationals on whom the United States relies for candid and frank assessments of internal conditions would be reluctant to believe in a U.S. promise of confidentiality." *Id.*, ¶ 8. For this reason, he stated (*id.* ¶ 9), the documents were being reviewed for classification pursuant to Executive Order No. 12,356, 47 Fed. Reg. 14,874 (1982). See *id* § 1.1(c) (documents protected pending classification review).

b. On March 27, 1989, the State Department informed the court in a supplemental memorandum that, following the review instituted by Deputy Assistant Secretary Melton, the identities of the Haitian nationals had been classified. R4:93. That memorandum was accompanied by the declaration of Pratt Byrd, the Acting Deputy Director of the Office of Mandatory Review in the State Department's Classification and Declassification Center. R4:95. Mr. Byrd explained that the interview reports are proper subjects of classification because they constitute information concerning "foreign relations or foreign activities of the United States" and "confidential source[s]," and that the names had been classified because their release "reasonably could be expected to cause damage to the national security of the United States." *Id.* ¶ 8 (quoting Exec. Order No. 12,356, §§ 1.3(a)(5) and (9), 1.3(b)).

In elaborating upon the foreign relations considerations supporting classification, Mr. Byrd explained that release of the identities of the Haitian nationals who co-

operated with the United States would make other foreign nationals in similar circumstances reluctant to speak with U.S. Embassy officials, and he identified a number of adverse consequences that would follow. First, the most effective way of ensuring that foreign governments abide by their agreements not to persecute persons who are interdicted and returned by the United States would be undermined. Byrd Decl. ¶ 11. Second, the United States monitors the treatment of persons who attempt to leave their country in order to assure humanitarian treatment of migrants and refugees, and "[o]ur inability to preserve confidentiality of sources who provide information on human rights conditions would jeopardize the government's ability to monitor human rights conditions under the Foreign Assistance Act of 1961, as amended [22 U.S.C. 2151n, 2304]." *Id.* ¶¶ 12, 13.

Third, a loss of confidentiality would undermine the usefulness of such interviews in enforcing United States laws, including Sections 207 and 208 of the Immigration and Nationality Act, 8 U.S.C. 1157 and 1158, which require the United States to assess claims or fears of persecution in connection with applications for political asylum and refugee admission. Byrd Decl. ¶ 13. Finally, the overall credibility of the United States in maintaining confidentiality would be damaged by release of the names, thereby "impairing the government's ability to obtain information about conditions and events in foreign countries generally, and * * * inhibiting the government's ability to anticipate and evaluate accurately changes in the local political scene which may have international ramifications." *Id.* ¶ 14.

c. The district court chose not to address the merits of the State Department's submission. Instead, in a brief order, the court held that the State Department had waived its Exemption 1 and 7 claims by failing to raise them until after the court had ordered disclosure. App., *infra*, 31a-33a.

3. a. The court of appeals affirmed. App., *infra*, 1a-24a. In addressing the Exemption 6 issue, *id.* at 6a-13a, the court thought it "important to candidly acknowledge that it appears that [respondents] seek the redacted information so that they can contact directly the Haitians who were interviewed by American officials and question them about how they are treated by the Haitian government since attempting to flee to the United States." *Id.* at 7a. "In light of that fact," the court found it "difficult to characterize this invasion of the Haitian returnees' privacy to be no more than de minimis," as the district court had done. *Ibid.* The court also noted that "the returnees were promised confidentiality before they talked with U.S. government officials," a factor that, although it does not compel withholding, "adds weight to the privacy interests at stake." *Id.* at 7a. For these reasons, the court of appeals "beg[a]n the balancing process by acknowledging that there are significant privacy interests at stake here." *Id.* at 8a.

Nevertheless, while regarding it as a "close question," the court held that disclosure was mandated, because it believed the significant privacy interests were outweighed by a legitimate public interest in disclosure. The court agreed with the State Department that respondents' desire to use the information in resisting deportation did not justify disclosure, because the goal of FOIA is "'to open agency action to the light of public scrutiny,'" not to further "private purposes." App., *infra*, 8a-9a (quoting *Department of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976)). But the court noted that respondents "also seek the information in order to learn whether the United States government is adequately monitoring Haiti's compliance with its obligation not to persecute returnees and to learn whether our government is honest to the public about Haiti's treatment of returnees." App., *infra*, 9a. In particular, it noted that respondents "dispute the view expressed publicly by some government officials that Haiti is adhering to its promise

not to punish returnees, and they seek information that will assist them in testing the accuracy of that information." *Ibid.* The court acknowledged that "the disclosure of the Haitians' names and addresses, in and of itself, will not tell [respondents] anything about Haiti's treatment of its returnees or the U.S. government's honesty about the matter." *Ibid.* But the court found it sufficient that release of the names "will give [respondents] a means to obtain 'public interest' information in that they can then locate the Haitian returnees and inquire about how they were treated after they were returned to Haiti." *Ibid.*

The court rejected the government's contention that requiring disclosure in this case would be inconsistent with *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989). App., *infra*, 10a-12a. It observed that in *Reporters Committee*, this Court had concluded that disclosure of criminal history information about an individual in a "rap sheet" maintained by the Federal Bureau of Investigation would reveal little about the conduct of the government. The court of appeals believed this case to be different because respondents "seek information about individuals that will help them to scrutinize what our government is doing and saying regarding Haitians who unsuccessfully attempt to flee to this country." *Id.* at 11a-12a.

b. The court of appeals also affirmed the district court's ruling that the State Department had waived its right to rely on Exemptions 1, 7(C) and 7(D) by failing to raise those arguments prior to the district court's rejection of its Exemption 6 claim. App., *infra*, 13a-15a. The court recited the government's representations that its failure to invoke Exemptions 1 and 7 was the result of pure mistake and that those claims "involve grave concerns of national security and foreign policy." *Id.* at 14a. And it recognized that under *Jordan* v. *Department of Justice*, 591 F.2d 753, 780 (D.C. Cir. 1978) (en banc), an appellate court may consider a claim of exemption that was not raised at all before the district court, if

the omission was due to pure mistake, the value of the material is very high, and it appears highly likely that the exemption does apply. But the court declined to follow that approach. Without discussing the State Department's declarations that explained the national security reasons for the classification decision, the court simply observed that it found it "difficult to believe that the redacted information implicates compelling national security concerns" in light of the government's failure to raise those concerns during the two-year period that the case was pending in the district court. *Ibid.*[5]

REASONS FOR GRANTING THE PETITION

In a highly sensitive setting involving the foreign relations of the United States, the court of appeals' decision seriously misconstrues Exemption 6 of the Freedom of Information Act, abrogates a clear governmental pledge of confidentiality, and conflicts with the analytical framework prescribed by *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989).

The decision below greatly undervalues the substantial privacy interests at stake for the Haitian nationals whose names the court of appeals has ordered the State Department to make public: it eviscerates both the State Department's promise of confidentiality and the Haitians' expectations of privacy that rested on that promise; it exposes the Haitians to the stigma of public identification as persons who cooperated with U.S. officials; it orders the release of unredacted copies of interview sum-

[5] On October 12, 1990, the court of appeals denied the State Department's petition for rehearing and suggestion for rehearing en banc. App., *infra*, 34a-35a. The court thereafter granted the government's motion for a stay of the mandate pending the filing and disposition of a petition for a writ of certiorari, provided that the petition was filed by November 13, 1990. The court of appeals previously had granted the government's motion for a stay pending rehearing, conditioned upon the government's filing the deleted information with its clerk, to be held under seal.

maries that reveal much private information about the cooperating Haitians; and it expressly contemplates (indeed applauds) the prospect that respondents will track down the individual Haitians and challenge the veracity of what they said (or were reported to have said) about their own government. Each of these invasions of privacy is unprecedented in FOIA caselaw and is alone sufficient to preclude disclosure here. The fact that the court of appeals nevertheless ordered public disclosure of the Haitians' names in the face of the *combined* force of these privacy interests demonstrates the degree to which its holding departs from the central purposes of Exemption 6.

The court countenanced these invasions of privacy by adopting a view of the countervailing "public interest" in disclosure that cannot be reconciled with the text or purposes of FOIA or with this Court's decision in *Reporters Committee*. The court of appeals did not find respondents entitled to obtain the names of the Haitian nationals based on the intrinsic informational value of those records, because, as the court acknowledged, the names reveal nothing about the operation of the government. Rather, it justified disclosure on the basis of respondents' plans to use those names as leads in their own investigation of conditions in Haiti, which they believed might in turn shed light on the State Department's performance of its responsibilities with respect to refugees. Under this derivative-use rationale, virtually any private information in government files—for example, the names deleted from the disciplinary summaries in *Department of Air Force* v. *Rose*, 425 U.S. 352 (1976), or the rap sheet in *Reporters Committee*—might be subject to disclosure to anyone who represents that he or she needs the information to investigate the particular government program. This vision of FOIA, and of Exemption 6, is inconsistent with the teaching of *Reporters Committee* that information is protected against mandatory disclosure if it would, in itself, "tell us nothing *directly* about" the conduct of government. 109 S. Ct. at 1482 (em-

phasis added). These rulings below conflict with decisions of other courts of appeals and threaten to eviscerate FOIA's protections for personal privacy. Review by this Court therefore is warranted.

The courts below also erred in refusing to entertain the State Department's submission that the identities of the Haitian nationals are protected by Exemptions 1 and 7 because those claims were not raised at an earlier stage in the district court proceedings. As a result, the judgment below requires the disclosure of sensitive information that has been classified by the State Department in the interest of national security and jeopardizes efforts by the United States to assure humanitarian treatment of refugees and respect for human rights. Review of this issue is warranted both to prevent the substantial public and private injuries that will be sustained if the classified information at issue here cannot be protected, and, more generally, to prescribe standards for addressing the government's invocation of exemptions in similar circumstances.

A. Although FOIA enacted a "broad philosophy of 'freedom of information,'" Congress found it "'necessary to protect certain equally important rights of privacy with respect to certain information in government files.'" *Department of Air Force* v. *Rose*, 425 U.S. at 372-373 n.9 (quoting S. Rep. No. 813, 89th Cong., 2d Sess. 3 (1965)). FOIA addresses these privacy concerns most broadly through Exemption 6, which provides that the Act "does not apply" to information "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552 (b)(6). This standard "'exclude[es] those kinds of files the disclosure of which might harm the individual,'" and, more generally, "'enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.'" *Rose*, 425 U.S. at 372 (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), and

S. Rep. No. 813, *supra*, at 9); *Reporters Committee*, 109 S. Ct. at 1483.[6]

In light of FOIA's special respect for personal privacy, "it should come as no surprise that in none of [its] cases construing the FOIA [has the Court] found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen." *Reporters Committee*, 109 S. Ct. at 1482. The court of appeals' decision in this case, however, does just that, seriously eroding the important protection afforded to personal privacy by Exemption 6 and substantially departing from the principles announced by this Court in *Reporters Committee* and other cases, and followed by other courts of appeals. The court's errors affect both the privacy and public-interest sides of the balance.

1. Although the court of appeals recognized that there are "significant privacy interests at stake" in this case, App., *infra*, 8a, it undervalued those interests in every critical respect. The cumulative nature of the court's errors suggests the need for guidance from this Court in formulating a structured rather than an ad hoc approach to identifying and assessing the relevant privacy considerations.

a. It is important at the outset to emphasize the context in which the particular privacy interests arise. In this case, as the court of appeals pointed out, the Haitian returnees "were promised confidentiality before they talked with U.S. government officials." App.,

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[6] In the law enforcement context, Exemption 7(C) provides further protection of privacy interests by excluding from mandatory disclosure information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). Both Exemption 6 and Exemption 7(C) call for a determination of the impact of disclosure upon personal privacy, as evidenced by the Court's application of the analytical framework of *Rose* in *Reporters Committee*. See 109 S.Ct. at 1476, 1478. Although the relative *weight* given the respective interests may differ under Exemptions 6 and 7(C), the discussion in *Reporters Committee* of the *types* of private and public interests to be considered under Exemption 7(C) applies to Exemption 6 as well.

infra, 7a. The court acknowledged that such a promise "adds weight to the privacy interests at stake here," but it did not believe that withholding was "compel[led]" on this ground. *Id.* at 7a-8a. Having said this much, the court gave no indication that it then took this factor into account in any meaningful way, even though the consequence of its ruling is that the United States will not be able to keep its word. In fact, established principles furnish guidance on the relevance of such a promise.

Assurances of confidentiality heighten an individual's expectation of privacy; in consequence, the release of information provided under such a pledge "involves a greater invasion of privacy than release of information provided without such a pledge." *Washington Post Co.* v. *HHS*, 690 F.2d 252, 263 (D.C. Cir. 1982). For this reason, "a government pledge of confidentiality, made in good faith and consistently honored, should generally be given weight on the privacy side of the scale in accord with its effect on expectations of privacy." *Ibid.* In *Washington Post* and *Robles* v. *EPA*, 484 F.2d 843, 846 (4th Cir. 1973), which were cited by the court of appeals for the proposition that a promise of confidentiality is not controlling (App., *infra*, 7a-8a), the pledge of confidentiality was limited and uneven, and there was correspondingly less reason to believe that it had led to a heightened expectation of privacy. In this case, by contrast, the interviews "were conducted with the clear understanding that they would be held confidential," and the uncontradicted record establishes that this understanding was important in causing the Haitian nationals to confide in U.S. officials. Melton Decl. ¶¶ 7-8, 10, 12; Byrd Decl. ¶¶ 10-12, 15. Thus, contrary to the court of appeals' belief, the test announced in the D.C. Circuit's *Washington Post* decision strongly supports withholding here.

Reporters Committee likewise supports the conclusion that expectations of privacy induced by this sort of understanding should be respected. The Court stressed in *Reporters Committee* that an important aspect of the

privacy protected by FOIA is "the individual's control of information concerning his or her person," because "information may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public.'" 109 S. Ct. at 1476 (quoting *Webster's Third New International Dictionary* 1804 (1976)). Where an individual voluntarily furnishes personal information to the government in reliance on a promise that it will be "restricted" to government use and not be "freely available to the public," a due regard for the individual's right not to have given that information in the first place should ordinarily allow the government to honor its promise. "Great nations, like great men, should keep their word." *Heckler* v. *Mathews*, 465 U.S. 728, 748 (1984); cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1010-1012 (1984).[7]

b. The privacy interests are enhanced in this case because of the nature of the information to which the expectation of privacy attaches. In the first place, disclosure of the individual Haitians' names would immediately and publicly identify them as persons who cooperated with the United States Government on a confidential basis by furnishing it with information about

[7] A similar protection for information submitted on the understanding that it will be kept confidential is reflected in Exemption 4, which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4); see H.R. Rep. No. 1497, *supra*, at 10 (Exemption 4 applies to information obtained through "questionnaires" and to material that "would not customarily be made public by the person from whom it was obtained"; "a citizen must be able to confide in his Government," and "where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations"). The same policy is embodied in Exemption 7(D), which applies to information compiled for law enforcement purposes the disclosure of which could reveal a "confidential source," including a state, local or foreign agency or private entity "which furnished information on a confidential basis." 5 U.S.C. 552(b)(7)(D).

the Haitian Government and their treatment by it. As the Eaves Declaration points out (at ¶ 8), this "would * * * subject them or their families to possible embarrassment in their social and community relationships." Mr. Eaves' guarded diplomatic understatement cannot obscure the basic point: cooperation with United States officials by foreigners is not always greeted with equanimity by the foreigners' government or countrymen—particularly when the cooperation concerns the conduct of that government. Compare *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 597 n.2 (1982) (quoting State Department affidavit) (certain Iranian leaders "have been strongly criticized in the press for their alleged ties to the United States," and "[a]ny individual in Iran * * * having American connections is looked upon with mistrust").

Furthermore, the redacted versions of the interview reports that have already been released to respondents contain private information about many of the persons who were interviewed: *e.g.*, marital status and number of children, employment status or history, living conditions, the circumstances of past attempts to enter the United States, or the receipt of Red Cross aid upon return.[8] If unredacted versions of the reports now must be made available under FOIA, as the courts below have ordered, the reports would reveal much information about the subjects of the reports that would unquestionably constitute a "clearly unwarranted" invasion of privacy under this Court's cases. Compare *Rose*, 425 U.S. at 375-377; *Washington Post*, 456 U.S. at 600-601; *Reporters Committee*, 109 S. Ct. at 1476-1480. In no FOIA case of which we are aware has a requester obtained personal information of this sort.

c. The decision below will also result in the invasion of an important aspect of privacy in addition to the right

[8] Redacted copies of the 17 documents, some of which consist of a number of separate interview summaries, are included as attachments to the Eaves Declaration.

to control dissemination of information about one's self—namely, "the right to be let alone." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). As the court of appeals recognized, respondents seek to identify the Haitian citizens who were interviewed on a confidential basis for the specific purpose of enabling respondents to contact those individuals personally and question them about how they have been treated by the Haitian Government since their return. App., *infra*, 7a.

In several recent decisions involving FOIA requests for lists of names and addresses of present or former federal employees, the D.C. Circuit has found a significant invasion of personal privacy solely by virtue of the potential that disclosure would lead to " 'an unwanted barrage of mailings and personal solicitations' " of a commercial or charitable nature.[9] The invasion of privacy in this case would be far more serious, because respondents intend to conduct in-depth interviews of the individual Haitians on subjects they heretofore have discussed with representatives from the United States only in confidence, and to challenge the veracity of what those individuals previously said (or were reported to have said). Cf. *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 737 (1970). The court of appeals failed to appreciate the magnitude of this further invasion of privacy, which, contrary to that court's holding, is sufficient in itself to preclude disclosure of the names respondents seek. See

[9] *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d 873, 876 (D.C. Cir. 1989) (quoting *Minnis* v. *Department of Agriculture*, 737 F.2d 784, 787 (9th Cir. 1984)), cert. denied, 110 S. Ct. 1805 (1990); *FLRA* v. *Department of the Treasury*, 884 F.2d 1446, 1452 (D.C. Cir. 1989), certs. denied, 110 S.Ct. 863 and 864 (1990); accord, *Department of Agriculture* v. *FLRA*, 836 F.2d 1139, 1143 (8th Cir. 1988), vacated on other grounds, 109 S. Ct. 831 (1989); *AFGE* v. *HHS*, 712 F.2d 931, 932 (4th Cir. 1983); *Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133, 136-137 (3d Cir. 1974).

Heights Community Congress v. *Veterans Administration*, 732 F.2d 526 (6th Cir.), cert. denied, 469 U.S. 1034 (1984), discussed at page 23, *infra*. Combined with the other invasions of privacy discussed above, the interests on the privacy side of the balance are compelling.

2.a. The court of appeals plainly erred in its assessment of the other side of the balance as well. *Reporters Committee* makes clear that any public interest supporting disclosure in this setting must rest on "the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny,' * * * rather than on the particular purpose for which the document is being requested." 109 S. Ct. at 1481 (quoting *Rose*, 425 U.S. at 372). FOIA "create[s] a broad right of access to 'official information,'" so that the people may be "informed about 'what their government is up to.'" *Ibid.* (quoting *EPA* v. *Mink*, 410 U.S. 73, 80 (1973), and *id.* at 105 (Douglas, J., dissenting)). "That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct." *Ibid.* It follows that the public-interest inquiry under FOIA's privacy exemptions is an objective one, based upon the intrinsic value of the requested material in conveying information about the conduct of government.

Consistent with this understanding, the Court explained in *Reporters Committee* that *redacted* versions of the Air Force Academy disciplinary-hearing summaries at issue in *Rose* were an appropriate subject of a FOIA request, because they showed how the disciplinary procedures actually functioned. By contrast, the Court explained that deletion of information that "would identify the particular cadets to whom the summaries related" was "unquestionably appropriate," because the names were irrelevant to the inquiry into the way the Academy administered its honor code. 109 S. Ct. at 1481-1482. The Court similarly concluded in *Reporters Committee* that the purposes of FOIA would not be furthered by release of a rap sheet containing the criminal history of an individual, even though the requesters sought that information because the individual allegedly had improper dealings with a corrupt Congressman and was an officer of a corporation having defense contracts. The Court pointed out that the requested information "would tell us nothing *directly* about the character of the *Congressman's* behavior" or "about the conduct of the *Department of Defense*" in awarding contracts to the corporation. *Reporters Committee*, 109 S.Ct. at 1482 (first emphasis added).

The State Department's treatment of respondents' FOIA request in this case directly parallels the course approved by the Court in *Rose* and *Reporters Committee*. It was "unquestionably appropriate" for the State Department to delete the names of the individual Haitians from the interview summaries released to respondents, because the names were "irrelevant" to the public's assessment of the interview process summarized in the reports; as in *Rose*, "leaving the identifying material in the summaries would therefore have been a 'clearly unwarranted' invasion of individual privacy." *Reporters Committee*, 109 S. Ct. at 1482. Accord, *Halloran* v. *Veterans Administration*, 874 F.2d 315, 324 (5th Cir. 1989); *Miller* v. *Bell*, 661 F.2d 623, 630-631 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982). And as in *Reporters Committee*, disclosure of the Haitians' names "would [not] tell us anything about the conduct of the *Department of* [*State*]." 109 S. Ct. at 1482. In fact, the court of appeals acknowledged that "the disclosure of the Haitians' names and addresses, in and of itself, will not tell [respondents] anything about Haiti's treatment of its returnees or the U.S. government's honesty about the matter." App., *infra*, 9a. That should have been the end of the case.

b. The court of appeals sought to avoid this result by reasoning that "the identifying information will give

[respondents] a means to obtain 'public interest' information in that they can then locate the Haitian returnees and inquire about how they were treated after they were returned to Haiti"—which the court apparently believed would then shed light on the State Department's performance. App., *infra*, 9a. There are a number of flaws in this analysis.

First, it invites wholesale circumvention of the important protection afforded to personal privacy under FOIA. In *Rose*, for example, the court of appeals' reasoning presumably would have required the Air Force to disclose the names it had deleted from the disciplinary-hearing summaries if the requesters had represented that they planned to contact the current and former cadets involved and ask them about the truth of the summaries and the fairness of the proceedings. Similarly, in *Reporters Committee*, the requesters might have obtained the rap sheet simply by expressing their intention to use it to investigate whether the FBI maintained accurate rap sheets or pursued all allegations of criminal activity they contain. Indeed, under the court of appeals' rationale, a requester could obtain access to a broad range of otherwise confidential files maintained in the health, welfare, selective service and veterans programs that FOIA's legislative history identifies as deserving of protection under Exemption 6 (see *Rose*, 425 U.S. at 375-376), so long as he planned to contact the individuals involved and interview them as part of an investigation into the administration of those governmental programs. That result would conflict with Congress's determination when it enacted FOIA that "these files should not be opened to the public." S. Rep. No. 813, *supra*, at 9.

Second, the court of appeals' derivative-use rationale cannot be squared with the holding in *Reporters Committee* that disclosure is not required if the requested information itself "would tell us nothing *directly*" about the conduct of the government. 109 S. Ct. at 1482 (emphasis added). This important limiting principle is rooted

in FOIA's text and purposes. FOIA regulates the public availability of "agency records" (5 U.S.C. 552(a)(4)(B)—*i.e.*, "official information" that is already in the possession of the agency and that documents or governs the conduct of its official business. *Reporters Committee*, 109 S. Ct. at 1481 & n.20. FOIA is not intended to facilitate access to information outside a federal agency, even where it has some relation to that agency's work. *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150-154 (1980). For this reason, Exemption 6 requires "a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to *governmental* information." *Rose*, 425 U.S. at 372 (quoting H.R. Rep. No. 1497, *supra*, at 11) (emphasis added). Respondents' desire to obtain *nongovernmental* information from private sources in Haiti that might shed light on the conduct of the Haitian Government—and, in turn, on the State Department's conduct in response—bears too indirect and attenuated a relationship to the purposes of FOIA to justify an invasion of the important privacy interests of the Haitian nationals that are protected by Exemption 6.

Third, the court of appeals' reliance on respondents' asserted plan to contact the Haitian nationals conflicts with the holding in *Reporters Committee* that "whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made." 109 S. Ct. 1480; see 5 U.S.C. 552(a)(3) (emphasis added) ("each agency, upon *any* request for records * * * shall make the records promptly available to *any* person"). Furthermore, an approach that turned on the derivative use that requesters intended to make of government records, rather than on their intrinsic informational value, would introduce undue speculation and complexity into the application of Exemption 6. In this case, for example, an accurate weighing of the asserted public interest in respondents' endeavor would require an

assessment of the likelihood that some number of the Haitian nationals would consent to be interviewed by respondents and would change their stories, and that respondents would be able to show that State Department officials were aware or should have been aware of the true circumstances. Congress did not intend the protection of privacy interests under Exemption 6 to depend upon such vague calculations.

Thus, when the respective elements of the private and public interests are brought more sharply into focus, the insubstantial and attenuated nature of the supposed public interest in identifying private Haitian citizens becomes apparent. Indeed, as explained above, that supposed interest is different in kind, not merely in degree, from the "public's right to *governmental* information," on which FOIA is based. H.R. Rep. No. 1497, at 11 (emphasis added).

3. The court of appeals' holding that the identities of the Haitian nationals are not protected from public disclosure by Exemption 6 warrants review for a number of reasons. First, its essentially ad hoc reasoning fails to accord the respect due the State Department's pledge of confidentiality, denigrates basic privacy values recognized by this Court in *Rose*, *Washington Post* and *Reporters Committee*, and minimizes the Haitians' privacy right under FOIA to be left alone. Second, the court of appeals' derivative-use rationale for mandating disclosure of private information fundamentally misconceives the relevant public interest under Exemption 6, as construed in *Reporters Committee*. Review by this Court could serve to furnish needed guidance to the lower courts on both aspects of the Exemption 6 analysis. The court of appeals' derivative-use rationale is of especially broad significance under FOIA, because—if permitted to stand—it would make substantial inroads on privacy protection and this Court's teaching in *Reporters Committee*.

Furthermore, both of these aspects of the decision below conflict with rulings by other courts of appeals.

The privacy ruling conflicts with the Sixth Circuit's pre-*Reporters Committee* decision in *Heights Community Congress* v. *Veterans Administration*, *supra*. There, the requester sought various documents utilized in VA loan guarantees in order "to determine if black veterans were receiving equal access to federal loan guarantees and to further investigate the possibility that lenders and realtors were manipulating the VA loan program so as to steer white and black veterans into specific areas." 732 F.2d at 527. The documents were released but, as here, all names and other identifying information were deleted. *Id.* at 528. The Sixth Circuit sustained the withholding, despite the acknowledged public importance of the racial steering issue. It was especially concerned that persons armed with the information could track down individual homeowners and interrogate them. In the court's view, "[h]olding a person's privacy hostage in this fashion is contrary * * * to the basic right * * * simply to be left alone." *Id.* at 530. Thus, the very sort of survey that was accepted by the court below as a justification for disclosure was found in *Heights Community Congress* to be antithetical to privacy interests protected by Exemption 6.

On the public-interest point, the decision below squarely conflicts with the D.C. Circuit's post-*Reporters Committee* ruling in *National Ass'n of Retired Federal Employees* v. *Horner*, *supra*. In that case, NARFE requested a list of the names and addresses of recent government retirees. 879 F.2d at 874. The court found no public interest, under *Reporters Committee*, that would outweigh what it termed the "significant" privacy interest involved. In response to NARFE's argument "that disclosure of the annuitants' names and addresses would aid NARFE in its lobbying activities, and thus result in the passage of laws that would benefit the public in general and federal retirees in particular," the D.C. Circuit observed that those considerations involved not what the government is up to, "but only what it might be up to if NARFE had its druthers." *Id.* at 879. The court likewise rejected the

asserted justification that disclosure of the names and addresses of federal annuitants would inform the public where its money is going, reasoning that under *Reporters Committee*, "unless the public would learn something *directly* about the workings of the *Government* by knowing the names and addresses of its annuitants, their disclosure is not affected with the public interest." *Ibid.* (first emphasis added).

If the court below had followed *NARFE*, then once it concluded that disclosure of the Haitians' names would not tell respondents anything about "Haiti's treatment of its returnees or the U.S. government's honesty about it," App., *infra*, 9a, the public-interest inquiry would have been at an end. Just as NARFE could not learn the identities of federal annuitants in order to enlist them in an effort to change government policy by lobbying, respondents may not learn the identities of the Haitian nationals in order to enlist them, through interviews, in an effort to monitor and change the State Department's approach to securing fair treatment of returnees by the Haitian Government. Accord, *Miller* v. *Bell*, 661 F.2d at 630.[10] These circuit conflicts warrant resolution.

B. The courts below also plainly erred in their refusal to entertain the State Department's submission that the identities of the Haitian nationals are properly classified in the interest of national security and are protected by FOIA Exemptions 1, 7(C) and 7(D). The district

[10] The D.C. Circuit reached a similar result in *FLRA* v. *Department of the Treasury*, *supra*, in which the FLRA ordered several federal agencies to supply labor unions with the names and home addresses of federal employees in collective bargaining units. The lawfulness of the FLRA's orders depended upon whether disclosure was required under FOIA, and the court held that it was not. The court recognized that the names of federal employees might provide leads for an investigative reporter to "ferret out what 'government is up to,'" but it found the public interest in disclosure for that purpose to be both minimal and insufficient to outweigh the workers' "significant" interest in the privacy of their homes. 884 F.2d at 1452-1453.

court, affirmed by the court of appeals, held that the State Department had waived its right to rely on those Exemptions because it did not invoke them until after the district court rejected its Exemption 6 claim. App., *infra*, 13a-15a, 32a-33a.

1. a. We readily acknowledge that the government should ordinarily be expected to invoke the FOIA exemptions upon which it relies in a timely manner in the district court. But mistakes and oversights inevitably occur in the processing and litigation of the daunting volume of FOIA requests, and important public interests in the confidentiality of governmental information should not automatically be sacrificed when they do. Cf. *OPM* v. *Richmond*, 110 S. Ct. 2465, 2469 (1990). The court of appeals agreed that the courts do have "some discretion" to take account of these practical realities "where justice so requires." App., *infra*, 14a. In fact, as the court of appeals recognized, *ibid.*, the en banc D.C. Circuit stated in the leading case in this area, *Jordan* v. *Department of Justice*, *supra*, that an appellate court has discretion to reach the merits of a FOIA exemption that (unlike those at issue here) was never even raised in the district court, if the failure to invoke the exemption was due to "pure mistake," if "the value of the material" is "obviously high, *e.g.*, confidential information compromising the nation's foreign relations or national security," and if it appears "highly likely" that the material was intended to be covered by one of the exemptions. 591 F.2d at 780. See also *Ryan* v. *Department of Justice*, 617 F.2d 781, 792 (D.C. Cir. 1980) (similar exception for "sensitive, personal private information"). *Jordan* further indicated that such discretion might be exercised to permit an agency to invoke an exemption for the first time on appeal where there has been a substantial change in the factual context or applicable legal doctrine. *Ibid.*; see *Washington Post Co.* v. *HHS*, 795 F.2d 205, 208 (D.C. Cir. 1986) (noting foregoing exceptions). These standards were satisfied here.

First, the court of appeals noted, and did not dispute, the State Department's explanation that its failure to invoke Exemptions 1 and 7 at an earlier time "was the result of pure mistake." App., *infra*, 14a. As Mr. Byrd stated in his declaration filed in the district court to explain the classification decision, when respondents first filed their FOIA request in 1987, the documents were reviewed by staff in the State Department's FOIA office who had only limited knowledge of the Haitian returnee program. They withheld the names under Exemption 6 because of the obvious privacy interests in the interview setting. Byrd Decl. ¶¶ 3, 4. However, immediately after the court issued its March 1989 order requiring disclosure, the matter was presented to the Acting Assistant Secretary of State for Inter-American Affairs, who "examined the issue and strongly opposed the release of the names based upon the foreign policy implications that such release would have." *Id.* ¶ 5. The matter was then referred to Deputy Assistant Secretary Melton, who promptly instituted a classification review and prepared a declaration to accompany the government's motion invoking Exemptions 1 and 7, which explained the foreign relations and law enforcement context of the Haitian returnee program. *Ibid.*; see pages 4-6, *supra*.

Second, as to the "value" of the information, the record shows that if confidentiality is breached, the identities of confidential sources and other information that has been classified in the interest of national security will be compromised. Compare *Jordan*, 591 F.2d at 780; *Washington Post*, 795 F.2d at 208. As a result, persons in Haiti and other countries will be reluctant to cooperate with U.S. officials; the United States will be "severely handicapped in its ability to obtain the information necessary to assess the success of its agreement with Haiti and the interdiction program"; its ability to monitor human rights violations in other countries will be impaired; and persons who have been persecuted will be fearful of informing the State Department about their mistreatment. Melton Decl. ¶¶ 10-12; see pages 5-7, *supra*. In addition, the personal privacy of the many Haitian nationals who cooperated with U.S. officials will be seriously invaded.

Third, Congress clearly did not intend to compel disclosure in this case. The information qualifies for withholding under Exemption 1 because its "unauthorized disclosure * * * reasonably could be expected to cause damage to the national security." Byrd Decl. ¶ 10 (quoting Exec. Order No. 12356, § 1.1(a)(3)). The information also is properly withheld under Exemptions 7(C) and 7(D). It was compiled for law enforcement purposes, in furtherance of the government's responsibilities under the federal statutes and international agreements regulating immigration and protecting refugees. Exemption 7(D) authorizes an agency to withhold information whenever disclosure "could reasonably be expected to disclose the identity of a confidential source," a prospect that cannot be seriously contested here. Moreover, given the court of appeals' view that this is a "close" case under Exemption 6, App., *infra*, 13a, there are firm grounds, even on that court's own terms, for withholding the names under Exemption 7(C)'s more lenient standard.

b. The court below cited *Jordan*, but only for the limited proposition "that courts have some discretion to excuse untimeliness where justice so requires." App., *infra*, 14a. Like the district court, it declined to inform its discretion in the manner indicated by that decision.[11] The sum total of its analysis was the observation that it was "difficult to believe that the redacted information implicates compelling national security concerns," in light of the State Department's failure to raise those concerns while the case was pending in the district court for al-

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[11] In this case, of course, the State Department did not invoke Exemptions 1 and 7 for the first time on appeal; it invoked them in the district court, after that court rejected the Exemption 6

most two years. App., *infra*, 9a. The court completely ignored the explanation in the Byrd Declaration, which shows that the identities of the Haitian nationals were immediately classified when the matter was brought to the attention of an official in a position to make the requisite foreign policy judgment. The court also failed to address the detailed explanation in the Melton and Byrd Declarations of the national security considerations warranting classification. When Congress amended Exemption 1 in 1974, it made clear that courts must accord "substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." H.R. Conf. Rep. No. 1380, 93d Cong. 2d Sess. 11 (1974). Compliance with that admonition is necessary to satisfy the *constitutional* requirement that courts accord the Executive the "utmost deference" in this area. *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). The court of appeals failed to fulfill that responsibility, instead indulging its own view that it was "difficult to believe" that disclosure implicated national security concerns.

2. The Exemption 1 issue presents special considerations for an additional reason. That Exemption applies only to matters that are both "specifically authorized" under criteria in an Executive order to be kept secret in the interest of national deefnse or foreign policy, and "in fact properly classified pursuant to such Executive order." When the district court rejected the State Department's reliance on Exemption 6 and ordered it to disclose the identities of the Haitian nationals, that information had not "in fact" been classified pursuant to the Executive Order; the necessary predicate for invoking Exemption 1 therefore was lacking at that time. Under both *Jordan* and general equitable and constitutional principles, the subsequent classification of the material

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claim but prior to final judgment. See page 4, *supra*. This therefore was an occasion for even greater flexibility than *Jordan* might otherwise provide.

pursuant to Presidential authority constituted an intervening change in the governing factual and legal context of the case that warranted modification of the district court's injunctive order requiring disclosure. See 591 F.2d at 789; *Washington Post*, 795 F.2d at 208; Fed. R. Civ. P. 60(b)(5) and (6); *System Fed'n No. 91, Ry. Employes' Dep't* v. *Wright*, 364 U.S. 642 (1961); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 430-432 (1855); *Dames & Moore* v. *Regan*, 453 U.S. 654, 684-685 (1981); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch)) 103, 110 (1801). In short, the Department of State raised the Exemption 1 claim as soon as the claim was properly available to it, after the information was classified.

3. It would be appropriate for this Court to grant review to afford guidance to the lower courts in addressing claims of exemption raised in circumstances such as these, rather than leaving the matter to the sort of unfettered discretion that the court of appeals appeared to invoke in this case. "[D]iscretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Albemare Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) (quoting *United States* v. *Burr*, 25 Fed. Cas. 30, 35 (C.C. Va. 1807) (Marshall, C.J.)). The question is especially appropriate for resolution here, because it arises in the sensitive context of inquiries conducted in confidence by U.S. officials concerning the treatment by a foreign government of its own nationals within its own territory. As we have explained (see page 7, *supra*), the State Department has broad responsibilities for monitoring human rights violations in other nations, and those efforts play an important role in the enforcement of our own laws as well, such as those governing refugee and asylum applications. If permitted to stand, the decision below will undermine the State Department's ability to assure the confidentiality of contacts with foreign nationals who furnish essential information on these and other subjects.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-5375

MICHAEL D. RAY, Individually and as Attorney for Certain Haitian National Clients and Ives Audate, Jean Hevil Loiseau and Yvon Nicholas, PLAINTIFFS-APPELLEES, CROSS-APPELLANTS

v.

UNITED STATES DEPARTMENT OF JUSTICE, Immigration and Naturalization Service and the State Department, DEFENDANTS-APPELLANTS, CROSS-APPELLEES

Appeal from the United States District Court
for the Southern District of Florida

Aug. 17, 1990

Before FAY and JOHNSON, Circuit Judges and FLOYD R. GIBSON *, Senior Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge:

Michael Ray, individually and on behalf of three named Haitians seeking political asylum in the United States, brought this action under the Freedom of Information Act ("FOIA") and the Adminis-

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

trative Procedure Act to compel the production of records from three federal agencies and for declaratory and injunctive relief from exclusion and deportation proceedings. In response to the plaintiffs' FOIA request, the Department of State produced 25 documents but redacted certain identifying information from 17 of them, claiming that the information was exempt from disclosure under FOIA. The district court ruled that the FOIA exception was not applicable and ordered the State Department to disclose the redacted information. The district court also dismissed the FOIA claims against the other two agencies, refused to enjoin the plaintiffs' deportation and exclusion proceedings, and refused the plaintiffs' request for class certification. Both sides appeal. We affirm the district court's decision.

I. FACTS

Named as defendants in this case are the Immigration and Naturalization Service of the United States Department of Justice ("INS"); the Executive Office for Immigration Review, Office of the Immigration Judge ("EOIR"); and the United States Department of State. Primarily, the plaintiffs seek information regarding how the Haitian government treats its citizens who have attempted unsuccessfully to flee to the United States and are returned to Haiti. The plaintiffs' desire for this information was triggered by two articles in Miami newspapers in which INS officials were quoted as stating that Haitian returnees were not being persecuted after they returned to Haiti. The first article stated that an INS district director so strongly believed that Haitian returnees were not being persecuted in Haiti that he "even offered to provide names of 600 Haitians who have

been sent back so that doubters can go to Haiti and speak to the people directly." Record Excerpts at 140 (quoting Miami News, March 12, 1985). In the second article, an INS official was quoted as stating that the "INS routinely sends inspectors to Haiti to interview people who have been returned by American authorities [and] failed emigees reported no persecution since their return." Record Excerpts at 119 (quoting The Miami Herald, Dec. 31, 1984).

The plaintiffs disagree with the view that returned Haitians are not subject to persecution. They submitted FOIA requests with the INS and the State Department seeking reports of interviews by INS officials with persons who had been involuntarily returned to Haiti. Dissatisfied with what they received, the plaintiffs filed this suit in November 1986 against the State Department, the INS, and the EOIR. The plaintiffs sought: (1) class certification; (2) an order compelling the defendants to comply with their FOIA requests; (3) an order enjoining the plaintiffs' final deportation and exclusion hearings until the defendants provided the requested information and for a period of six months thereafter; and, (4) an order enjoining the dissemination of disinformation by the defendants to the public concerning the fate of Haitian returnees.

The plaintiffs seek an injunction against their deportation proceedings because they believe that they cannot adequately make their cases for political asylum unless they can produce evidence that the Haitian government will persecute them if they are returned. Because of the views expressed by government officials in the Miami newspapers, the plaintiffs anticipate that the State Department, which routinely issues advisory opinions to the INS regarding

asylum applications, will represent to the INS that returned Haitians do not face ill treatment in Haiti. The plaintiffs believe that the information they requested under FOIA is essential to their effort to show that they will be subject to punishment in Haiti, and thus they requested the district court to enjoin those proceedings until they receive the information and have had an opportunity to examine it.

In a motion for summary judgment, the INS maintained that it had no records that were responsive to the plaintiffs' FOIA requests, and the EOIR maintained that the district court lacked jurisdiction to consider claims against it because the plaintiffs never submitted a FOIA request to the EOIR. The State Department did produce 25 documents, but from 17 of them the names, addresses, and other identifying information were redacted. The State Department submitted that the withholding of this identifying information was sanctioned by 5 U.S.C. § 552(b)(6) ("Exemption 6"), which exempts from FOIA's mandatory disclosure requirements disclosures which would cause "a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1988).

The district court found that the plaintiffs never made a FOIA request to the EOIR. It further found that the INS had conducted a proper search of its records pursuant to the plaintiffs' request and that the record failed to disclose that the INS was improperly withholding any relevant documents. Accordingly, the district court granted summary judgment to the INS and EOIR. *Ray v. United States Dept. of Justice*, 725 F. Supp. 502, 504-05 (S.D. Fla. 1989).

With regard to the State Department, the district court ruled that Exemption 6 of FOIA did not apply to preclude disclosure of the redacted information. Thus, the court ordered the State Department to supply the redacted information within 15 days. Finally, the district court denied the plaintiffs' request for an order enjoining their deportation and exclusion proceedings and denied their motion for class certification. *Id.* at 505.

Both sides filed motions to alter or amend the judgment. The government's motion asked the district court to authorize the State Department's redactions under FOIA Exemptions 1 and 7 [1], which had not been raised before; the government also presented further argument under Exemption 6. The district court did not consider the government's Exemption 1 and 7 arguments, finding that the government waived those issues by failing to raise them prior to the district court's judgment. *Id.* at 505-06. The district court granted the State Department's motion for a stay pending appeal.

The State Department appeals the district court's ruling ordering it to supply the redacted information. The plaintiffs cross-appeal the district court's denial of class certification, its refusal to enjoin their deportation and exclusion proceedings, and its ruling that the searches conducted by the INS and the State Department were adequate.

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[1] Exemption 1 excludes matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (1988). Exemptions 7(C) and 7(D) exclude matters that are "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, [or] (D) could reasonably be expected to disclose the identity of a confidential source. . . ." 5 U.S.C. § 552(b)(7)(C) & (D) (1988).

We affirm the district court's judgment in all respects.

II. ANALYSIS

A. *The Government's Appeal*

1. Exemption 6 of FOIA

We begin with the arguments raised by the State Department as appellant in this case. The State Department appeals the district court's ruling that it must disclose the information that it redacted from the documents it supplied to the plaintiffs. The government submits that the redacted information, which consists of the names and other identifying information of the Haitian returnees who were interviewed, is exempt from disclosure by 5 U.S.C. § 552(b)(6), which provides that FOIA's mandatory disclosure requirement does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1988).

Because FOIA is a "broad disclosure statute which evidences a 'strong public policy in favor of public access to information in the possession of federal agencies'" *Cochran v. United States*, 770 F.2d 949, 954 (11th Cir. 1985) (quoting *Brown v. Federal Bureau of Investigation*, 658 F.2d 71, 73 (2d Cir. 1981)), the disclosure requirements of FOIA must be construed broadly and the exceptions narrowly. *Id.* Documents are presumed to be subject to disclosure; when the government seeks to invoke an exemption, it bears the burden of proving that the exemption applies. *Id. See also Department of the Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976); *Ely v. Federal Bureau*

of Investigation, 781 F.2d 1487, 1489-90 (11th Cir. 1986); *Currie v. Internal Revenue Service*, 704 F.2d 523, 530 (11th Cir. 1983).

In determining whether Exemption 6 applies we apply a balancing test, "weighing an individual's right to protection of privacy against the public's right to disclosure of government information." *Cochran*, 770 F.2d at 955 (citations omitted). *See also Rose*, 425 U.S. at 372, 96 S.Ct. at 1604. After employing that test the district court in this case concluded that "[a]ny invasion of privacy from the mere act of disclosure of names and addresses would be de minimis and little more than speculation. . . . [T]he balance tilts in favor of disclosure of the names because any intrusion into the privacy of the Haitian nationals would be minimal." *Ray*, 725 F. Supp. at 505.

While we believe that the privacy interests at stake here are somewhat more significant than the district court considered them to be, we ultimately agree with the district court that "the balance tilts in favor of disclosure." *Id.* We think it important to candidly acknowledge that it appears that the plaintiffs seek the redacted information so that they can contact directly the Haitians who were interviewed by American officials and question them about how they are treated by the Haitian government since attempting to flee to the United States. In light of that fact, we find it difficult to characterize this invasion of the Haitian returnees' privacy to be no more than de minimis. We are also mindful, as the government points out, that the returnees were promised confidentiality before they talked with U.S. government officials. That, of course, is a factor that adds weight to the privacy interests at stake here, but is not a

factor that compels us to prohibit disclosure in this case. *See Washington Post Co. v. United States Dept. of Health and Human Services*, 690 F.2d 263 (D.C. Cir. 1982); *Robles v. Environmental Protection Agency*, 484 F.2d 843, 846 (4th Cir. 1973) ("promise of confidentiality is a factor be be considered," but cannot "in and of [itself], override the Act") (citaitons omitted). Thus, we begin the balancing process by acknowledging that there are significant privacy interests at stake here.

Despite that acknowledgment, we hold that disclosure is mandated because, when balanced against the legitimate public interest in the information, the privacy interest is outweighed. In this regard the government insists that no public interest cognizable under FOIA will be served by disclosure in this case, emphasizing the fact that the plaintiffs seek the information to further their individual interests in gaining political asylum. We recognize that the Supreme Court has made clear that the FOIA's basic purpose is to provide the public with a means of learning what its government is up to: the Act is not designed to assist citizens in gaining information about other individuals for private purposes. In *United States Dept. of Justice v. Reporters Committee*, —— U.S. ——, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989), the Court stated "the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." *Id.* 109 S.Ct. at 1482. Thus, in weighing the public interest served by a particular disclosure we must determine whether disclosure will serve FOIA's basic purpose—" 'to open agency action to the light of public scrutiny.' " *Rose*, 425 U.S. at 361,

96 S.Ct. at 1599 (quoting *Rose v. Department of the Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)).

The government argues that the plaintiffs in this case seek the redacted information only to resist deportation efforts against them. We agree that to the extent that the plaintiffs' objectives are self-serving, they indeed are not the kind of objectives that FOIA was meant to further. However, the plaintiffs also seek the information in order to learn whether the United States government is adequately monitoring Haiti's compliance with its obligation not to persecute returnees and to learn whether our government is honest to the public about Haiti's treatment of returnees. They dispute the view expressed publicly by some government officials that Haiti is adhering to its promise not to punish returnees, and they seek information that will assist them in testing the accuracy of that information. We consider these to be matters of great public interest significant enough to outweigh the privacy interests of the Haitian returnees.

The government concedes that there exists "a legitimate public interest in the safe relocation of Haitians." Initial Brief for the Government Agencies at 41. It argues, however, that the disclosure of the identities of the Haitian returnees will not serve that public interest in any way. Obviously, the disclosure of the Haitians' names and addresses, in and of itself, will not tell the plaintiffs anything about Haiti's treatment of its returnees or the U.S. government's honesty about the matter. But the identifying information will give the plaintiffs a means to obtain "public interest" information in that they can then locate the Haitian returnees and inquire about how they were treated after they were returned to Haiti.

The plaintiffs avoid admitting that they intend to use the information by contacting the Haitians directly, but that is the clear implication, and it is one that we do not take lightly. The implication that disclosure will result in direct contacts with the returned Haitians is the factor that makes the invasion of privacy in this case more than "de minimis". But that factor also convinces us that the information sought here is imbued with a significant public interest because it is a means for the public to see what its government is up to regarding the relocation of Haitians and what it is telling the public on the matter.

We have considered the government's argument that requiring disclosure in this case would be inconsistent with the Supreme Court's most recent case on FOIA's privacy exemptions, *United States Dept. of Justice* v. *Reporters Committee*, —— U.S. ——, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989). In that case the Supreme Court addressed whether FOIA Exemption 7(C) precluded disclosure of a private citizen's "rap sheet" in the possession of the FBI.[2] The requesters argued that the information was of public interest in that the subject of the rap sheet was an officer of a corporation that allegedly had obtained a number of defense contracts as a result of improper

[2] Exemption 7(C) excludes from the mandatory disclosure requirement records or information compiled for law enforcement purposes, "but only to the extent that the production of such [materials] could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (1988). The Court did not address the application of Exemption 6. Although the two exemptions involve somewhat different standards, *see Reporters Committee*, 109 S.Ct. at 1473, many of the general principles applicable to the two exemptions are the same. *See id.* at 1479.

dealings with a corrupt Congressman. *Id.* at 1482. The Supreme Court rejected this argument, reasoning that disclosure of the rap sheet would not disclose anything about the actions of the Congressman, the Department of Defense, or any other government agency or official, and, accordingly, the invasion of privacy that would result from disclosure was not justified by a public interest cognizable under FOIA. The Court emphasized that the purpose of FOIA is not the disclosure of information about private individuals but, rather, information about the government, its agencies, and its agents acting in the line of duty. *Id.*

Our holding here is not inconsistent with *Reporters Committee*. The Supreme Court in *Reporters Committee* refused to disclose certain information about an individual because the information did not shed any light on the government or a government agent. In other words, the release of the information would not serve a public interest as that term is used in the FOIA context. The Court stated that

> [FOIA's] purpose . . . is not fostered by disclosure of information about private citizens that is accumulated in various governmental files *but that reveals little or nothing about an agency's own conduct*. In this case—and presumably in the typical case in which one private citizen is seeking information about another—the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.

Id. at 1481 (emphasis added).

Nothing in *Reporters Committee* precludes the possibility that a FOIA request about a private individual may involve legitimate public interests; that case only explains that in the typical case where an individual seeks information about another individual, legitimate FOIA purposes are not involved. We consider this to be an atypical case. The plaintiffs herein seek information about individuals that will help them to scrutitinize what our government is doing and saying regarding Haitians who unsuccessfully attempt to flee to this country. This is an important public interest—the kind which Congress had in mind in framing FOIA. As the Court stated in *Reporters Committee*, "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within [FOIA's] statutory purpose." *Id.*

The government also relies heavily on the D.C. Circuit's decisions in *Federal Labor Relations Auth. v. United States Dept. of the Treas., Financial Management Serv.*, 884 F.2d 1446 (D.C.Cir.1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 863, 107 L.Ed.2d 947, 948 (1990), and *National Assn. of Retired Federal Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 1805, 108 L.Ed.2d 936 (1990). Both cases involved FOIA requests for names and addresses of private individuals and whether Exemption 6 precluded disclosure. In both instances the D.C. Circuit concluded that disclosure would cause privacy invasions that were not justified by legitimate public interest in the information. In *Horner*, the court concluded that the information sought was not of any public interest, 879 F.2d at 879, and in *FLRA* the court found the public interest to be only slightly higher than in *Horner*. 884 F.2d at 1452-53. These cases are distinguishable

from the instant case in that here the plaintiffs have identified a very strong public interest in the requested information that is sufficient to outweigh the privacy interest that will be infringed by disclosure.

After careful consideration, then, we conclude that the government has not demonstrated that disclosure of the Haitians' names and addresses "would constitute a clearly unwarranted invasion of personal privacy." It is a close question, but we are convinced that the invasion of privacy that will likely result from disclosure is outweighed by the strong public interest in the information. We have a duty to construe FOIA's disclosure provisions broadly and its exemptions narrowly, and to impose on the government the burden of proving that an exemption applies. Applying these standards, we conclude that the government has not demonstrated that the redacted information in exempt from disclosure by Exemption 6. Accordingly, we affirm the district court's ruling that the State Department must disclose the redacted information.

2. Waiver of FOIA Exemptions

After the district court ruled on March 2, 1989, that the redacted information was not protected by Exemption 6 of FOIA, the State Department filed a motion to alter or amend the judgment, arguing for the first time since this action was filed in June 1987 that the redacted information is also exempt from disclosure by Exemptions 1, 7(C), and 7(D) of FOIA.[3] The district court declined to rule on the merits of these claims, finding that the government waived them by not asserting them in its answer or at any time prior to the district court's judgment. *Ray*, 725 F.Supp. at 505-06.

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[3] *See* footnote 1.

The government now argues that the district court erred in finding that it waived these exemptions and asks this court to reach the merits of these issues. The government explains that its failure to timely raise the additional exemption claims was the result of pure mistake and that this court should decide these issues because they involve grave concerns of national security and foreign policy. The government relies primarily on *Jordan v. United States Dept. of Justice*, 591 F.2d 753 (D.C.Cir.1978) (en banc), where the D.C. Circuit stated that an appellate court has the discretion to reach the merits of a FOIA exemption not raised before the district court if the failure to raise it was due to pure mistake, the value of the material is very high, and it appears highly likely that the exemption does apply. *Id.* at 780.

We agree that courts have some discretion to excuse untimeliness where justice so requires, but we do not believe that this is such a case. We find it difficult to believe that the redacted information implicates compelling national security concerns in light of the government's failure *for almost two full years* to bring these concerns to the attention of the court or the plaintiffs. We find no circumstances in this case that warrant not applying the fundamental rule that a defendant must "allege all affirmative defenses in a responsive pleading and the failure to do so will normally result in waiver." *Chilivis v. Securities and Exchange Comm'n*, 673 F.2d 1205, 1208 (11th Cir. 1982). Thus, we affirm the district court's ruling that the State Department waived its Exemption 1, 7(C), and 7(D) arguments and, accordingly, we need not reach the merits of those claims. *See also Senate of Puerto Rico v. United States Dept. of Justice*, 823 F.2d 574, 580 (D.C.Cir.1987) and cases cited therein

(explaining that courts should not allow government to raise FOIA exemptions in a piecemeal fashion).

B. *The Plaintiffs' Cross-Appeal*

1. Class Certification

The plaintiffs argue on cross-appeal that the district court abused its discretion by refusing to certify a class pursuant to Federal Rule of Civil Procedure 23. The plaintiffs proposed to define their class as follows: "all black Haitian citizens presently under exclusion or deportation proceedings, or under final orders of exclusion or deportation, or who will be under such proceedings or orders in time to join this class, and who have or who will present a claim for political asylum before the immigration judges." Second Amended Complaint at 3.

Federal Rule of Civil Procedure 23(a) sets out the following requirements for the certification of a class: (1) numerousity; (2) commonality; (3) typicality; and (4) adequacy of representation. Considerable discretion is afforded the district court on questions regarding class certification. We review the district court's decision only to determine whether it has abused its discretion. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir.), *cert. denied*, 479 U.S. 883, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986); *Griffin v. Carlin*, 755 F.2d 1516, 1531 (11th Cir.1985).

We find no abuse of discretion in this case. The plaintiffs do not make clear for what purpose they want a class certified—that is, whether they seek certification for their FOIA claim or their claim for injunctive relief. Certifying a class for the plaintiffs' FOIA claims in this case would serve no purpose be-

cause information released to a plaintiff under FOIA is equally available to any person who requests it. *See National Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S.Ct. 1504, 1515, 44 L.Ed.2d 29 (1975).

Apparently the plaintiffs seek class certification for purposes of their request for an injunction against their exclusion and deportation proceedings. We note that the named plaintiff who seeks to represent the class, Michael Ray, does not appear to be an adequate representative in that he has not alleged that he is a Haitian citizen who is facing deportation or exclusion proceedings or who is seeking political asylum in the United States. He is an attorney who represents Haitians facing action by the INS. In any event, because we affirm the district court's denial of the plaintiffs' request for an injunction, the question of whether a class should be certified for that purpose is mooted.

2. Adequacy of FOIA Searches

The plaintiffs next argue that the district court erred in ruling that neither the INS nor the State Department improperly withheld documents from them. The adequacy of an agency's search for documents requested under FOIA is judged by a reasonableness standard. *Miller v. United States Dept. of State*, 779 F.2d 1378, 1383 (8th Cir.1985). Under this standard, the agency need not show that its search was exhaustive. Rather, " 'the agency must show beyond material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents.' " *Id.* (quoting *Weisberg v. United States Dept. of Justice*, 705 F.2d 1344, 1351 (D.C.Cir. 1983)). The government agency may meet this burden by producing affidavits of responsible officials "so long as the affidavits are relatively detailed, nonconclusory, and submitted in good faith." *Miller*, 779 F.2d at 1383 (citation omitted). If the government agency meets its burden of proving that its search was reasonable, then the burden shifts to the requester to rebut the agency's evidence by showing that the search was not reasonable or was not conducted in good faith. *Id.*

We first address the adequacy of the State Department's search. As stated above, the district court ruled that the State Department complied with FOIA by releasing the 25 documents, pending its production of the redacted information. The plaintiffs claim that the State Department should have been required to produce more information. Specifically, they rely on a State Department report submitted to the district court entitled "Country Reports on Human Rights Practices for 1985," where reference is made to interviews of 582 Haitian returnees regarding their treatment after returning to Haiti. The plaintiffs complain that the documents turned over by the State Department provide information about only 395 such interviews and insist that there must exist documentation on the other 187 interviews.

The State Department submitted the affidavit of Frank Machak, Chief of the State Department's Information Access and Services Division. He explained that in response to Ray's request for information relating to interviews conducted of Haitian returnees by U.S. officials, the State Department searched the records of the Department's Office of Visa Services, the Bureau of Refugee Programs, and the Bureau of Human Rights and Humanitarian Affairs, and found no relevant records. However, responsive documents

were found in a search of the Central Foreign Policy Records. That is the source of the 25 documents provided to the plaintiffs. Mr. Machak further explained that regarding Ray's request for the names of 600 Haitian returnees the State Department searched the same offices, as well as the Bureau of Inter-American Affairs. No relevant documents were found. See Record, Vol. II, Exhibit L, Affidavit of Frank Machak.

We are satisfied that the State Department conducted a search reasonably calculated to uncover all requested materials. As explained above, FOIA does not require an agency to exhaust all files which conceivably could contain relevant information. The standard is one of reasonableness, and, based on the affidavits provided by the State Department, we conclude that that standard is met here. The plaintiffs' emphasis of a particular reference to 582 interviews, while they received information regarding only 384 interviews, is not enough to rebut the government's showing of an adequate search. In a similar context, the Eighth Circuit has noted that

> [t]he fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it. Thus, the [agency] is not required by [FOIA] to account for documents which the requester has in some way identified if it has made a diligent search for those documents in the places in which they might be expected to be found; it is not necessary "to create a document that does not exist in order to satisfy a [FOIA] request."

Miller, 779 F.2d at 1385 (quoting *Yeager v. Drug Enforcement Administration*, 678 F.2d 315, 321 (D.C.Cir.1982)).

Here, we have evidence of a diligent search that uncovered a good portion of what the requesters sought. The plaintiffs have not convinced us that the State Department did not make a reasonable attempt to find the documentation of the other interviews; for that matter, they have not convinced us that documentation was even made of each individual interview. We hold that the State Department complied with the requirements of FOIA in producing the 25 documents to the plaintiffs, subject, of course, to our affirmance of the district court's order that it supply the redacted information.[4]

The plaintiffs did not present argument in their appellate brief regarding the adequacy of the INS' search. Nor did they submit argument regarding the dismissal of their FOIA claim against the EOIR on the ground that no FOIA request was ever made to the EOIR. It is the government's impression that the plaintiffs have abandoned their claims against the INS and the EOIR. *See* Initial Brief for the Government Agencies at 7 n.2. The plaintiffs do, however,

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[4] The State Department points out that the reason for the discrepancy in the number of interviews may be that it reasonably construed the plaintiffs' requests to require production of documents for only approximately the first half of 1985, and the reference in the State Department report to 582 interviews covered the first nine months of 1985. The State Department states that it will construe the plaintiffs' brief in this case as a new FOIA request for any additional documents covering the interviews mentioned in the 1985 Country Reports. *See* Initial Brief for the Government Agencies at 26-27 n. 11. Thus, it appears that the plaintiffs can and will receive the information they desire. Despite that, we rule that the State Department's conduct in this case complied with FOIA because we are convinced that it performed a search that was reasonably calculated to locate the requested documents.

appear to appeal the district court's rulings on these issues because in their appellate brief they request this court to reverse the district court's grant of summary judgment to the INS and the EOIR. *See* Brief of Appellees-Cross Appellants at 32. Thus, we address these issues.

We have reviewed the record and are satisfied that the district court was correct in granting summary judgment to the INS and the EOIR. A plaintiff in a FOIA suit must show that an agency improperly withheld agency records. *Kissinger v. Reporters Committee*, 445 U.S. 136, 150, 100 S.Ct. 960, 968, 63 L.Ed.2d 267 (1980). Clearly, if a FOIA claim has not been made to an agency, that agency cannot be said to have improperly withheld documents. The plaintiffs admit that they did not submit a FOIA request to the EOIR. Brief of Appellees and Response of Cross-Appellants at 35. Thus, the claim against that agency was properly dismissed.

Our review also convinces us that the district court correctly ruled that the INS' search was reasonable. In response to the plaintiffs' requests, the INS stated that it did not conduct investigatory trips to Haiti and thus did not have reports of such trips. The INS contacted the person quoted in the newspaper article regarding a list of 600 Haitian returnees; he stated that he was misquoted in the article and did not have such a list. *See* Record, Vol. I, Government Exhibits F, G, H. We are satisfied that the INS conducted a reasonable search, and the plaintiffs have not put forth specific evidence to the contrary. Thus, there exists no genuine issue of material fact as to the adequacy of the INS' search.

The district court's grant of summary judgment to the INS and the EOIR is affirmed.

3. Injunctive Relief

We next address the plaintiffs' claim that the district court abused its discretion in failing to grant injunctive relief from their deportation and exclusion proceedings. The plaintiffs claim that until they receive the information they requested from the INS and the State Department they are unable adequately to defend themselves in their political asylum hearings before the EOIR. Thus, they requested the district court to "enjoin the final deportation and exclusion hearings of the members of the plaintiff class until such time as defendants have provided the FOIA requested information and for a period of at least six (6) months thereafter, so plaintiffs can study, analyze and verify defendants' reports as to what happens to returnees to Haiti." Second Amended Complaint at 14. The district court refused to grant an injunction, noting that it had "no authority to enjoin [the plaintiffs' INS deportation proceedings] under the FOIA or the Administrative Procedure Act, Title 5 U.S.C. sec. 704-706." *Ray*, 725 F.Supp. at 505 n. 3.

We are not convinced by the plaintiffs' argument that the district court's ruling in this regard was an abuse of discretion. The remedies that courts are authorized to grant in FOIA cases are expressly enumerated in FOIA, and they do not include the issuance of an injunction against related agency action. Under FOIA, the district court may: (1) enjoin an agency's withholding of documents and order production of relevant records where it has been found that information is being improperly withheld, 5 U.S.C. § 552(a)(4)(B) (1988); (2) assess against the United States attorney fees and other litigation expenses in cases where the plaintiff prevailed, 5 U.S.C. § 552(a)(4)(E) (1988); (3) dis-

cipline an agency official guilty of arbitrary and capricious action, 5 U.S.C. § 552(a)(4)(F) (1988), and (4) use its contempt power to punish an agency official for disobeying a disclosure order, 5 U.S.C. § 552(a)(4)(G) (1988). FOIA does not expressly provide the district courts with jurisdiction to enjoin agency proceedings that may be related to the subject matter of a plaintiff's FOIA request, and we are aware of no authority that has inferred such a power.

The plaintiffs also argue that the district court had authority to enjoin INS proceedings under the Administrative Procedure Act and cite us to 5 U.S.C. §§ 704 & 706 (1988). Neither of those provisions authorizes the injunctive relief that the plaintiffs seek here. Those provisions deal with final agency action and agency action made reviewable by statute.

As the defendants point out, in some limited circumstances federal courts have allowed suits directly attacking the processing of aliens notwithstanding the exhaustion requirements of 8 U.S.C. § 1105a(c) and notwithstanding the absence of a final administrative order. *See, e.g., Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir.) (judicial intervention allowed prior to final agency decision in order to enjoin widespread practice of denying claimants' notice of their right to present asylum claim to particular agency), *cert. denied*, 469 U.S. 1071, 105 S.Ct. 563, 83 L.Ed.2d 504 (1984); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir.1982) (claims of "a pattern and practice by immigration officials to violate the constitutional rights of a class of aliens . . . constitute wrongs which are independently cognizable in the district court under its federal question jurisdiction" (footnote omitted)).

Those cases do not support judicial intervention in this case. In *Smith* and *Jean*, the court authorized judicial review of INS proceedings prior to exhaustion because of the unique circumstance that the plaintiffs were claiming widespread, systematic wrongs in their exclusion proceedings. *See Jean*, 727 F.2d at 980; *Smith*, 676 F.2d at 1033. Further, in those cases, by delaying the assertion of their claims until after they exhausted agency remedies the plaintiffs, under their particular circumstances, would have completely foregone the opportunity to assert their claims. *See Jean*, 727 F.2d at 980; *Smith*, 676 F.2d at 1035.

That is not the case here. The plaintiffs do not allege that they are being subjected to broadly applied procedures in their exclusion proceedings that somehow render those proceedings illegal. Nor do they claim that if they pursue their administrative remedies they will have lost the opportunity to present their evidence that they would face persecution if returned to Haiti. The INS provides them with adequate opportunities to rebut evidence that they will not be subject to ill treatment. *See* 8 C.F.R. § 208.8(d) (1989). And, if they acquire evidence after their proceedings that they believe would have helped their case, there are means by which they can cause their case to be reopened for the consideration of such evidence. *See* 8 C.F.R. § 3.2 (1989).

In light of the avenues available to the plaintiffs, and in light of the important policies underlying the exhaustion doctrine, *see Smith*, 676 F.2d at 1034, we believe that the district court acted properly in refraining from entering an injunctive order delaying the plaintiffs' deportation and exclusion proceedings pending the government's compliance with their

FOIA requests. The district court's denial of the plaintiffs' request for an injunction is thus affirmed.

III. CONCLUSION

We affirm the district court's decision in all respects. Accordingly, the State Department is ordered to release, within fifteen days of entry of this order, the information that it redacted from 17 of the 25 documents provided to the plaintiffs pursuant to FOIA. All remaining claims against the State Department, the INS, and the EOIR are dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

Case No. 86-2430-CIV-HASTINGS

MICHAEL RAY, ESQ., ETC., ET AL., PLAINTIFFS

v.

UNITED STATES DEPT. OF JUSTICE, ET AL.,
DEFENDANTS

[Filed Mar. 3, 1989]

MEMORANDUM ORDER ON PENDING MOTIONS

THIS CAUSE was heard by the Court on various pending motions filed by the parties, and the Court hereby enters this Order pursuant to its rulings in open court on March 1, 1989.

I

This case is brought pursuant to the Freedom of Information Act, 5 U.S.C. sec. 552 (FOIA), under which plaintiffs seek from the Immigration and Naturalization Service (INS), the Executive Office for Immigration Review (EOIR) and the United States Department of State (State Dept.) disclosure of (1) an alleged list of 600 Haitians who had been returned to Haiti and not mistreated after their arrival; and (2) investigative trip reports made by INS investigators who have visited Haiti.

Several searches conducted by each agency yielded responses that no records were found which fit the FOIA request made by plaintiffs. Subsequently, the State Dept. located and turned over to the plaintiffs twenty-five (25) responsive documents. Of these, seventeen documents were redacted to exclude the names of the Haitian individuals contained therein. The State Dept. claimed that release of the excised information could result in an invasion of privacy and, accordingly, asserted an exemption under the Freedom of Information Act ("FOIA"), 5 USC sec. 552(b)(6).[1] At all times, however, each agency has maintained that there exists no list of 600 Haitians returned to Haiti.

II

There are two issues confronting the Court. The first issue concerns disclosure requirements when an agency's asserts that its search uncovers no documents which satisfy an FOIA request. The second issue focuses on disclosure requirements when an agency claims that information excised from the released documents is exempt under the invasion of privacy exemption of sec. 552(b)(6).

A. *Documents Claimed Not to Exist*

The underlying principle in FOIA cases is that the requestor must show that an agency improperly withheld records. *Kissinger v. Reporter's Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980). With respect to records that are claimed not to exist,

[1] 5 U.S.C. sec. 552(b)(6) provides an exemption from disclosure for matters that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

affidavits are permissible and "possibly the best method of verification." *Stephenson v. IRS*, 629 F.2d 1140, 1145 (1th Cir. 1980). An affidavit satisfies the "good faith" requirements of adequacy and completeness when it specifically documents the scope and methods undertaken for search and sets out the basis for the withholding of information. *See Freidman v. F.B.I.*, 605 F.Supp. 306, 316 (N.D.Ga. 1981). Once the agency demonstrates that its search was reasonable, the burden shifts to the requestor to rebut that evidence. *Miller v. U.S. Dept. of State*, 779 F.2d 1378, 1383 (8th Cir. 1985).

In this instance, the INS has responded that it did not conduct investigatory trips to Haiti nor have, in its possession, investigative reports. It has also maintained, by its answer, that the list of six hundred Haitians does not exists. The record indicates that there was a proper and adequate search, as demonstrated by the affidavits of the FOIA personnel. The record fails to disclose that any documents have been improperly withheld o[r] that they, indeed, exist. On the record, that principle has not been rebutted by the plaintiffs. In addition, the record indicates there have been no requests directed to EOIR, and, therefore, there is no issue before the Court in connection with that party.

B. *Documents Edited & Released by the State Department*

Where a FOIA request triggers a claim of exemption under the Act, the burden is on the government agency to demonstrate the basis for nondisclosure. Thus, contrary to the agency's assertion, a justiciable issue remains to be decided, and that is the propriety of the State Dept's claim of exemption under

sec. 552(b)(6), because "the District Court must do something more to assure itself of the factual basis and bona fides of the agency's claim of exemption than rely solely upon an affidavit." *Stephenson v. IRS*, 629 F.2d 1140 (5th Cir. 1980).

There is a presumption, under the FOIA, that documents held by a government agency are subject to disclosure. *Currie v. IRS*, 704 F.2d 523, 530 (11th Cir. 1983). An agency cannot withhold material based on conclusory allegations of possible harm; it must show by specific, detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA. *See Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). In determining whether the disclosure constitutes a "clearly unwaranted invasion of personal privacy,[2] the Court must employ a balancing test, weighing an individual's right of privacy against the public right to disclosure of government information. *Cochran v. United States*, 770 F.2d 949, 955 (11th Cir. 1985).

The degree of the invasion of privacy considers the potential harm to the individual from disclosure of the information. The critical aspect is that an invasion be actual rather than just theoretical; it must be more than a mere possibility. *Dept. of Air Force v. Rose*, 425 U.S. 352, 360 n.19 (1976). Moreover, an agency's promise of confidentiality to the submitter of information was found insufficient to defend against disclosure. *Robles v. E.P.A.*, 484 F.2d 842, 846 (4th Cir. 1973).

---

[2] Under sec. 552(b)(6), the requested files must be "personnel", "medical", or "similar files". Because plaintiffs did not challenge this classification, the Court assumes that the names of returned Haitians are sufficiently personal in nature to satisfy the "similar file" requirement.

As to the public interest involved in this case, this country's immigration policy supports a finding that the public has a legitimate interest in the safe relocation of returned Haitians.

Any invasion of privacy from the mere act of disclosure of names and addresses would be de minimis and little more than speculation. The promise of confidentiality by the State Dept. is only one factor to be considered and, in this case, is not determinative of the outcome. Thus, weighing the public interest against the private interest, the balance tilts in favor of disclosure of the names because any intrusion into the privacy of the Haitian nationals would be minimal.

III

For these reasons, it is hereby

ORDERED AND ADJUDGED that summary judgment is GRANTED in favor of INS and EOIR with respect to the FOIA information requests explained or shown to be non-existent. It is

FURTHER ORDERED AND ADJUDGED that the State Department is required, within fifteen days from this Court's ruling in open court, to supply the redacted information contained in the seventeen documents. Final judgment as to the State Department is withheld until this time period has expired and a showing has been made to the Court that the names have been furnished to the plaintiffs, and, if they have not, then the Court will take further appropriate action forthwith.[3]

---

[3] The remaining pending motions in this case are DENIED without prejudice. Plaintiffs' request for this Court to enjoin INS deportation proceedings is also DENIED. This Court has no authority to enjoin those proceedings under the FOIA or the Administrative Procedure Act, Title 5 U.S.C. sec. 704-706.

DONE AND ORDERED at Miami, FL, this 3rd day of March 1989.

/s/ David W. Dyer
DAVID W. DYER
Senior United States
Circuit Judge,
Sitting By Designation

Copies to:
M. Ray, Esq.
L. Summers, AUSA

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 86-2430-Civ-HASTINGS

MICHAEL D. RAY, ESQUIRE, individually and as attorney for certain Haitian political asylum applicants, IVES AUDATE, JEAN HEVIL LOISEAU, and YVON NICHOLAS, on behalf of themselves and all others similarly situated, PLAINTIFFS

vs.

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION and NATURALIZATION SERVICE and EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE IMMIGRATION JUDGE, and the STATE DEPARTMENT, DEFENDANTS

ORDER COMPELLING STATE DEP'T TO
RELEASE UNREDACTED DOCUMENTS
WITHIN TEN DAYS

THIS CAUSE having come before the Court, and the Court having heard argument of counsel on April 12, 1989, and considered the same, it is hereby

ORDERED AND ADJUDGED that plaintiffs' motion for *pro hac vice* appearance of Neil D. Kolner, Esq. is GRANTED and it is

FURTHER ORDERED AND ADJUDGED that defendants' motion to alter or amend is DENIED. After weighing the public interest in disclosure against the claim of exemption pursuant to 5 U.S.C. 552(b)(6), this court ordered the STATE DEPART-

MENT on March 2, 1989 to produce to plaintiffs, no later than March 16, 1989 as originally requested in plaintiff's June 15, 1985 Freedom of Information Act Request, unredacted copies of all documents in defendant's possession which satisfy plaintiff's request. Defendants did not comply but instead raised new arguments which the Court finds are wholly unfounded. Rather than exhibit due diligence the government has been neglectful in this matter by failing to raise ~~these~~ exemptions at the outset of this litigation. Consequently, the government has waived entitlement to those claims by invoking these belated exemptions after this Court's order requiring disclosure of the redacted information. *See, e.g., Senate of the Commonwealth of Puerto Rico v. Dept. of Justice*, 823 F.2d 574, 580 (D.C. Cir. 1987); *Ryan v. Dept. of Justice*, 617 F.2d 781, 782 (D.C. Cir. 1980); *Jordan v. Dept. of Justice*, 591 F.2d 753 (D.C. Cir. 1978) (en banc); *Cotner v. U.S. Parole Comm.*, 747 F.2d 1016, 1018 (5th Cir. 1984); *Fendler v. Parole Comm.*, 774 F.2d 925, 978 (9th Cir. 1985); *American Broadcasting Co. v. U.S.I.A.*, 599 F. Supp. 765, 768 (D.D.C. 1984); *Donovan v. F.B.I.*, 633 F. Supp. 35 (S.D.N.Y. 1986). The government has failed to point to any set of facts that would make this an "exceptional" case such that the waiver doctrine should not apply. *See Jordan* at 780. Indeed, by its own admission at oral argument, the government agreed its motion contains nothing more than "new material." Thus, in its prior Order this Court did not overlook any basis in the record which would require a different conclusion. The government has only attempted to "play cat and mouse by withholding its most powerful canon until after the district court has decided the case and then springing it on surprised opponents and the judge." *Senate of*

the Commonwealth, 823 F.2d at 580, *quoting Grumann Aircraft Engineering Corp. v. Renegotiation Board*, 482 F.2d 710, 722 (D.C. Cir. 1973). For this reason, it is therefore

FURTHER ORDERED AND ADJUDGED that the STATE DEPARTMENT shall release the unredacted documents to plaintiffs no later than ten (10) days from this Court's oral ruling on April 13, DONE AND ORDERED at Miami, Florida, this 1989.

/s/ David W. Dyer
DAVID W. DYER
Senior United States
Circuit Judge
Sitting By Designation

Copies: Counsel

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5375

MICHAEL D. RAY, Individually and as attorney for certain Haitian national clients and IVES AUDATE, JEAN HEVIL LOISEAU and YVON NICHOLAS, PLAINTIFFS-APPELLEES, CROSS-APPELLANTS

versus

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE and THE STATE DEPARTMENT, DEFENDANTS-APPELLANTS, CROSS-APPELLEES

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion August 17, 1990, 11 Cir., 1990, —— F.2d ——)

(October 12, 1990)

Before FAY and JOHNSON, Circuit Judges, and GIBSON *, Senior Judge.

---

* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no matter of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing en Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay
United States Circuit Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

Case No. 86-2430-CIV-HASTINGS

MICHAEL RAY, ESQ., ETC., ET AL., PLAINTIFFS

vs.

UNITED STATES DEPT. OF JUSTICE, ET AL.,
DEFENDANTS

[Filed Mar. 3, 1989]

FINAL JUDGMENT

THIS CAUSE came before the Court for hearing on pending motions and the issues having been duly heard, in accordance with Federal Rules of Civil Procedure 54(b) and 58, and pursuant to this Court's Memorandum Order entered this date, it is hereby

ORDERED AND ADJUDGED that summary judgment is GRANTED in favor of the Immigration and Naturalization Service, and that this action is DISMISSED on the merits; and it is

FURTHER ORDERED AND ADJUDGED that summary judgment is GRANTED in favor of the

Executive Office of Immigration Review, and that this action is DISMISSED on the merits.

DONE AND ORDERED at Miami, FL, this 2nd day of March 1989.

/s/ David W. Dyer
DAVID W. DYER
Senior United States
Circuit Judge,
Sitting By Designation

Copies: Counsel

APPENDIX F

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in relevant part:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public, information as follows:

* * * * *

(3) * * * [E]ach agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * * * *

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

* * * * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, [or] (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis * * *;

* * * * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282081 20158

(2)

No. 90-747

Supreme Court, U.S.
FILED
JAN 23 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

UNITED STATES DEPARTMENT OF STATE, *Petitioner,*

v.

MICHAEL D. RAY, Individually and as attorney for certain Haitian political asylum applicants, IVES AUDATE, JEAN HEVIL LOISEAU, and YVON NICOLAS, on behalf of themselves and all others similarly situated, *Respondents.*

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In order to conceal violations of international and domestic law regarding the humane treatment of political refugees, may the State Department engage in a public disinformation campaign through the media to cover up its systematic breaches and then to further the cover-up, classify documents contrary to Executive Order?

2. May the government evade its obligations to disclose documents when ordered to do so under the Freedom of Information Act by withholding its most powerful cannon - a claim of "national security" exemption - and then springing it on surprised opponents and the judge after the trial court has denied its other exemption claim?

PARTIES TO THE PROCEEDING BELOW

The parties in the Court of Appeals included the following:

1. As identified in the caption of this document, Respondents were plaintiffs below. Although three named plaintiffs sought to certify this as a class action to include all other similarly situated Haitian political asylum applicants, their motion was denied.

2. Defendants in addition to Petitioner United States Department of State included the United States Department of Justice, Immigration and Naturalization Service; and the Executive Office for Immigration Review, Office of the Immigration Judge. Those parties are not before this Court.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-747

UNITED STATES DEPARTMENT OF STATE, *Petitioner,*

v.

MICHAEL D. RAY, Individually and as attorney for certain Haitian political asylum applicants, IVES AUDATE, JEAN HEVIL LOISEAU, and YVON NICOLAS, on behalf of themselves and all others similarly situated, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 908 F.2d 1549, and reprinted in the Appendix to the Petition. (Pet. App. 1a-24a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provision of the Freedom of Information Act, 5 U.S.C. § 552:

> "(6)(a) Each agency, upon any request for records * * * shall–
> (i) determine within ten days (excepting Saturdays, Sundays and legal public holidays) after the receipt of any such request whether to comply with such a request and shall immediately notify the person making such request of such determination and the reasons therefor * * *"

Relevant language from Rule 8 (c) Federal Rules of Civil Procedure:

> "In pleading to a preceding pleading, a party shall set forth affirmatively * * * any other matter constituting an avoidance or affirmative defense. * * *"

Relevant language from Executive Order 12,356, 47 Fed. Reg. 14,877 (April 2, 1982):

§ 1.6. Limitations on Classification.

> (a) In no case shall information be classified in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; * * * or to prevent or delay the release of information that does not require protection in the interest of national security."

STATEMENT

Petitioner United States Department of State has been propagandizing the public, especially the Haitian immigrant community in the United States, that Haitians who have fled from Haiti and then are sent back by the United States government are neither persecuted nor do they face mistreatment. The propaganda suggests that political repression in Haiti is non-existent. The State Department's message is in total conflict with virtually all world-wide media reports of widespread imprisonment, torture, and murder of opponents of the Haitian Government - Duvalier's henchmen - and random machine-gunnings in places perceived to be anti-government from voting booths to cathedrals.

When Respondents filed Freedom of Information Act requests for the facts upon which Petitioner based its apparently false propaganda, the State Department failed to honor those requests. Only after the district court ordered it to disclose the secret facts upon which it based its propaganda did the State Department first claim that to release the information could endanger our "national security".

The State Department's publicity program is documented in several telegrams from the American Embassy in Haiti to the Secretary of State in Washington, in 1984 and 1985. R2-45 EX.2, 4, 9, 11.

State Department telegrams pleading for assistance in spreading the Department's party line - that returned Haitians have not been mistreated - were also sent to officials in the U.S. Immigration and Naturalization Service. For example, a February 1984 telegram states:

> " * * * * many Haitians in the US believe that they would be mistreated or persecuted should they return to Haiti. Such is not the case, as the Department knows.

> Publicity on the effective returnee follow-up program would be particularly helpful in Miami and New York since many Haitians currently in Detention there do not return voluntarily to Haiti for fear of what awaits them on their return.
>
> To meet this problem, the Embassy proposes that the Department seek a suitable opportunity to present the facts to the target audiences concerned. * * *
>
> Our objective here is to present the facts to the Haitian community in the US with a view toward facilitation the decision to return by Haitians who truly want to return to their families here but are deterred by false information foisted on them for political reasons."

R2-45-EX2-3.[1]

The director of the Miami Immigration and Naturalization Service (INS) District was reported to have "offered to provide names of 600 Haitians who have been sent back" by U.S. authorities and have not received any mistreatment or persecution by the Haitian government, according to a March 12, 1985 *Miami News* editorial. The publicized offer to provide the Haitians' names was "so that doubters can go to Haiti and speak to the people directly." (R1-1-EX.A).

Relying on the INS district director's publicized offer, respondent Michael D. Ray (Ray) filed a Freedom of Information Act (FOIA) request in the Miami INS District seeking the names of those 600 Haitians who allegedly had

[1] But see the June 26, 1986 telegram from the Embassy in Port Au Prince to the State Department suggesting termination of the interview program. ("* * * [g]iven four years of uniform failure to find any underpinning for the original concerns about migrant motivations and welfare, we believe the returnee followup program is no no longer a justifiable use of funds or manpower and should be terminated.") An authenticated copy of this telegram was presented to the court of appeals in [Respondents'] Request to Take Judicial Notice, (May 21, 1990).

not been persecuted nor mistreated. Ray's request was received by INS on March 18, 1985.

Seventy-four (74) days later[2], the INS' response to Ray's FOIA request claimed that "[w]e have made a complete search for the records that relate to your request and none were found." The INS response also maintained that the district director "has stated that he was misquoted by the Miami News." (R1-36-EX.B).

The Immigration and Naturalization Service "routinely sends inspectors to interview people who have been returned by American authorities" according to remarks attributed to an INS spokesman in a front page banner headline story, *Influx of Haitians puzzles U.S. officials; Calm seas or stormy politics: Everyone has an explanation* (Dec. 31, 1984) *Miami Herald*.[3] (R1-1-EX.F).

Ray filed a Freedom of Information Act request with INS seeking reports of these "routine" INS inspectors' interviews. (Feb. 28, 1985). INS' response was that "you should submit your request to the State Department, Washington, D.C." (R1-1-EX.G).

As directed by INS, Ray then filed his Freedom of Information Act request with the State Department. (June 15,

[2] This delay is not authorized under the Freedom of Information Act which states that upon receipt of a request for records an agency "shall determine within ten days" whether to comply and "shall immediately notify" the requester. 5 U.S.C. 552 (a) (6) (a).

[3] The spokesman later filed a declaration stating that he, too, had been misquoted (R1-13-EX.B) which declaration was specifically rebutted by the Miami Herald reporter who had attributed the remarks to the INS spokesman, and who swore to the accuracy of his story in deposition. R1-25-15,16.

1985). (R1-1-EX.H).[4]

After waiting for more than seventeen (17) months for the required 10-day response from the State Department to his June, 1985 Freedom of Information Act request[5] Ray filed this lawsuit in the Southern District of Florida in November 1986, seeking an order compelling release of the records which he had requested and which he contended were being improperly withheld in violation of the Freedom of Information Act. Specifically, Ray was seeking the alleged 600 names of Haitians who had been returned to Haiti without facing any mistreatment or persecution,[6] which information would establish whether the State Department interviews were, in fact, ever conducted. R1-1.

In order to escape judicial review the government cited their in-house propaganda to prove their public propaganda. Specifically, the government defendants, including the petitioner State Department all moved to dismiss and attached their own *Country Reports on Human Rights Practices for 1985*,[7] as evidence in support of their allegations that the "number of Haitian returnees referred to (600) [by the Miami INS district director in the *Miami News* editorial] that have not

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[4] Respondents JEAN HEVIL LOISEAU and YVON NICOLAS submitted a similar - but not identical - Freedom of Information Act request to the State Department which was received on May 8, 1987.

[5] See: n.2, infra.

[6] An allegation completely contrary to continuing world media reports including those in New York Times and aired on CBS' 60 Minutes. See: e.g. [Respondent's] Request to Take Judicial Notice, No. 89-5375 (11th Cir. May 21, 1990) containing news accounts: "Florida Center Holding Aliens Is Under Inquiry: Additional Complaints Made About Abuse", N.Y. Times, May 16, 1990, at A8, col.1 ("The Haitian Government had detained at least 29 Haitians who had been deported from Miami over the last 10 days, said American officials * * **.).

[7] U.S. Department of State, 99th Cong., 2d Sess., at 579 (Jt. Comm. Print 1986).

suffered persecution is confirmed by U.S. Embassy interviews of 582 returnees to Haiti". (R1-10-5).

The relevant passage from the State Department's *Country Reports* states:

> Follow-up trips to the Haitian countryside by the Creole-speaking returnee officer of the U.S. Embassy continue to demonstrate * * * that the Government is honoring its commitment not to harass or persecute Haitians who have illegally left the country and then been returned. In the first 9 months of 1985, *582 returnees were interviewed and no one alleged persecution or intimidation by the Haitian government.*

R1-10-EX.at 579 (emphasis added).

Ultimately, more than two years after Ray's Freedom of Information Act request was received by the State Department, more than seven months after Ray filed this lawsuit, and after a careful review by its Classification/Declassification Center, the State Department released documents in response to Ray's request in July, 1987. State Department claimed exemption from disclosure for seventeen of the 25 documents released on the sole basis of 5 U.S.C. § 552 (b)(6) which exempts only: "personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Again, nearly four months later "the Department of State carefully reviewed the seventeen documents" (which purportedly had only withheld names and other identifying information) and released some additional information. All but one of the seventeen documents were originally and currently "UNCLASSIFIED" according to the October 1987 declaration of John Eaves, the Acting Deputy Director of the Office of Mandatory Review of the Classification and Declassification Center in the State Department. R2-52-EX.1

The trial court Ordered the unredacted documents to be disclosed within fifteen days because the court found State Department's (b)(6) privacy exemption claim was outweighed by the public interest and thus the balance tilts in favor of disclosure (See Pet. 28a-29a).

Yet, on the day after the trial court's disclosure deadline when the unredacted documents were to have been released, the State Department *for the first time* raised "national security" as a basis for failing to comply with the trial court's order, and as a new reason for withholding the redacted information. The State Department raised four new claims of exemption.[8]

The trial court ordered the parties to "be prepared to argue whether the Government waived any entitlement to [these new exemptions] by failing to invoke these exemptions prior to the issuance of" the district court's order compelling disclosure.[9] The district court held a hearing and asked the

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[8] The four new exemptions the State Department claimed were: **1.** Exemption (b)(1): matters that are "specifically authorized under criteria established by Executive order to be kept secret in the interest of national defense or foreign policy and (b) are in fact properly classified pursuant to such Executive order" 5 U.S.C. § 552 (b)(1); **2.** Exemption (b)(5): "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" 5 U.S.C. § 552 (b)(5); **3 & 4.** (b)(7) "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (C) could reasonably be expected to constitute an unwarranted invasion of a personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source. 5 U.S.C. § 552 (b)(7)(C),(D).

[9] R4-96. The district court also ruled in this Order that "the Government shall supplement the record as necessary to include affidavits containing the requisite specificity to support each claim of exemption. See: e.g. Lesar v. U.S. Dept. of Justice, 636 F.2d 472 (D.C. Cir. 1980)." Id. The government failed to file any new affidavits.

State Department's attorney why the government had not raised these new exemptions sooner.

> THE COURT: "Are you suggesting to me that the Government has just recently decided that release of these 17 names will jeopardize the treaties, and the Government and national security.
>
> As I review this record the defendants, as long--the Government, as long as back as October 6th, 1987, requested additional time to justify the claimed exemptions.
>
> MS. JEANDHEUR: I believe the claimed exemption was the exemption 6.
>
> THE COURT: Why didn't they consider these others back that long?
>
> MS. JEANDHEUR: *There was no attempt to*. I don't believe they short changed this case at all. There was review of the documents, but it was only when the documents were [ordered to be] released that *an official at a high enough level who was able to see the more global implication* of the releases of this document, reviewed the information and realized the policy concerns involved in such a release." * * *
>
> THE COURT: * * * It is really not a reconsideration because of any mistake that was made, or any error that I made that they wanted.
>
> MS. JEANDHEUR: That is right."

2SR-3-5 (emphasis added).

Significantly, the State Department attorney agreed with the district court that there was no mistake in failing to classify the documents. Contrariwise, the government's brief to the court of appeals stated that "the failure to raise the exemption was due to 'pure mistake'" and "[w]hat happened here was

the result of pure mistake."[10]

The State Department had *again* decided to re-review the documents to see "if the information withheld from the documents met the criteria for classification". This newest re-review resulting in security classification was conducted by an official with the exact *same title and security clearance*[11] as the officer who had previously determined that the documents were not classsified.

The trial court denied the State Department's motion for reconsideration of its disclosure order, finding the State Department's delay in presenting the additional claims of exemption and new arguments "wholly unfounded". (Pet. 32a). The trial court succinctly summarized the merits of the government's position and of its stance before the court:

> The government has failed to point to any set of facts that would make this an "exceptional" case such that the waiver doctrine should not apply *See Jordan* at 780. Indeed, by its own admission at oral argument, the government agreed its motion contains nothing more than "new material." Thus, in its prior Order this Court did not overlook any basis in the record which would require a different conclusion. The government has only attempted to "*play cat and mouse by withholding its most powerful cannon until after the district court has decided the case and then springing it on surprised opponents and the judge.*" *Senate of the Commonwealth*, 823 F.2d at 580, *quoting Grummman Aircraft Engineering Corp. v. Renegotiation Board*, 482 F.2d 710, 722 (D.C. Cir. 1973).

Pet. 32a-33a (emphasis added).

[10] See: Initial Brief for the Government Agencies, 19 and 45 89-5375 (11th Cir. Jan. 22, 1990). The State Department also assured the Eleventh Circuit that "review of the record, even with the aid of a microscope, will not reveal even the slightest scintilla of a suggestion that the government's predicament was caused by other than a 'pure mistake'" Reply Brief for the Government, 12 (Mar. 15, 1990).

[11] John Eaves - Acting Deputy Director of the Office of Mandatory Review of the Classification and Declassification Center in the State Department.

The court of appeals affirmed. (Pet. App. 1a-24a). The court of appeals also considered the years of government delay before the State Department attempted to even assert the protection of additional exemptions, as constituting a waiver of the right to raise the exemptions. The Eleventh Circuit stated:

> We find it difficult to believe that the redacted information implicates compelling national security concerns in light of the government's failure *for almost two full years* to bring these concerns to the attention of the court or the plaintiffs. We find no circumstances in this case that warrant not applying the fundamental rule that a defendant "must allege all affirmative defenses in a responsive pleading and the failure to do so will normally result in waiver."[12] *Chilivis v. Securities and Exchange Comm'n*, 673 F.2d 1205, 1208 (11th Cir. 1982).

Pet App. 14a. (emphasis in original).

The State Department petitioned for rehearing, and also suggested the Eleventh Circuit rehear this case *en banc*. Not one single Eleventh Circuit judge considered that the decision was incorrectly decided or that the case was significant enough even to request a poll of the other judges on the government's petition. Pet. App. 35a.

[12] See also: Fed.R.Civ.P. 8 (c).

The State Department requested a stay of the Eleventh Circuit's order requiring the release of the documents within 15 days of the entry of the Eleventh Circuit's order. The government requested a stay pending an opportunity for review in this Court. The decision of the Eleventh Circuit panel is significant and reveals the court's thinking about the government's conduct in this case:

> "* * * After weighing all of the factors involved, including the past conduct of the government in this matter, we grant the conditional relief set forth herein.
>
> The government shall file immediately with the clerk of this Court all of the redacted information ordered released. The clerk is instructed to hold this information under seal until further order of the Court. Should the government fail to file the redacted information with the clerk of this Court by noon on Tuesday September 4, 1990, the request for a stay is denied. * * *"

Order of Stay, (11th Cir. Aug. 31, 1990).

The government managed to timely deliver certain documents under seal to the clerk of the Eleventh Circuit where they remain.

REASONS FOR DENYING THE WRIT

The State Department has attempted to monopolize the debate on an issue of great public importance through its publicity campaign - a campaign based on secret information which it still refuses to disclose. Further, the government relies on its secrets to prove there is no political bloodshed in Haiti, in contrast to virtually all reports by world-wide observers, from the *New York Times* to CBS' *60 Minutes*, and the United

Nations.[13] With the information respondents requested and the courts below have ordered the government to disclose, respondents will be able to determine whether the State Department's public relations program is based on truth.

Disinformation & Propaganda Program Improper for National Defense-Foreign Policy Exemption

This Court in *Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989), reiterated the philosophy embodied in the Freedom of Information Act, and warned that if we forget history we are doomed to relive it:

> " 'The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know *what their government is up to*.' "

109 S.Ct. at 1481 (emphasis in original, citations omitted).

Congress did not intend to permit the Executive to use the "national security" exemption to escape compliance with the Freedom of Information Act. The record here establishes that

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[13] See e.g. "Is Duvalier Really Gone?", Vol. XX, 60 Minutes, (No. 7, Nov. 1, 1987), and more recently Vol. 2 HAITI Insight, 1 (No. 6, Nov./Dec. 1990) ("Haunting the electors' memories is the experience of November 1987, when scores of would-be voters were slaughtered as they approached the polls, and the elections were cancelled by the military government in favor of fraudulent elections seven weeks later. In the months leading up to November 29, 1987, two presidential candidates and hundreds of ordinary Haitians were killed, and the electoral council's offices were burned to the ground. * * * almost 700 monitors representing the United Nations and the Organization of American States who will be monitoring the elections [in attempts to avert violence] * * *").

the State Department has conducted a propaganda campaign to further the State Department's objectives.[14] For the Judicial Branch to allow the Executive to simply classify documents in violation of Executive Order, in its efforts to resist disclosure of documented State Department wrong-doing would permit the Freedom of Information Act to become a "shambles". As Justice Douglas stated in another FOIA case:

> "[A]s has been revealed by such exposés as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin 'incident,' and the Bay of Pigs invasion, the Government usually suppresses damaging news but highlights favorable news. In this filtering process the secrecy stamp is the officials' tool of suppression and it has been used to withhold information which in '99½%' of the cases would present no danger to national security."

EPA v. Mink, 410 U.S. at 108-09 (Douglas, J., dissenting) *quoting Gravel v. United States*, 408 U.S. 606, 641-642 (1972) (Douglas, J., dissenting).

Justice Douglas's analysis is appropriate to this case, since by the government's own admission "there was no attempt to" use the secrecy stamp until after the district court had ordered disclosure.[15] In response to the ruling in *EPA v. Mink*, Congress amended the national defense/foreign policy (b)(1) Exemption to provide for judicial review when the Executive makes a claim that documents are classified and thus, exempt from disclosure.

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[14] See: supra, at 3-4.

[15] See: supra, at 9.

Executive Order Outlaws Cover-ups Like State Department's

The current FOIA text requires that such claims of "secret" be "in fact properly classified pursuant to Executive order" 5 U.S.C. 552 (b)(1)(B).

Currently, Executive Order 12356, (47 Fed. Reg. 14874) issued by President Reagan in 1982 controls such claims under Exemption (b)(1). However, § 1.6 states that:

> *"In no case shall information be classified in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization or agency;* to restrain competition; *or to prevent or delay the release of information that does not require protection in the interest of national security".*

(emphasis added).

Yet, such is precisely what has been done by the State Department here. By President Reagan's Order, at least three of these grounds prohibit security classification of the documents in this case.

Therefore, even were this Court to countenance the State Department's more than two-year delay in asserting the (b)(1) exemption, the Executive order prohibits the State Department's attempts at a cover-up, and the documents must still be disclosed.

The State Department's attempt to use the "secret" stamp to cover-up the agency's dirty work is not without precedent. Justice Douglas observed:

> [t]he Government seeks to escape from the Act by making the Government stamp of "Top Secret"

> or "Secret" a barrier * * * whether or not factual information contained in the document is in fact colorably related to interests of the national defense or foreign policy. Yet anyone who has ever been in the Executive Branch knows how convenient the "Top Secret" or "Secret" stamp is, how easy it is to use, and how it covers perhaps for decades the footprints of a nervous bureaucrat or a wary executive.

Environmental Protection Agency v. Mink, 410 U.S. 73, 108 (1973) (Douglas, J., dissenting).

Merely because an official in the State Department determined that a document may have "met the criteria for classification"[16] does not necessarily indicate that the document deserves to be exempted from disclosure because the official believes so. The late former Justice and former Ambassador to the United Nations Arthur Goldberg has stated: "I have read and prepared countless thousands of classified documents. In my experience, *75 percent of these documents should never have been classified in the first place; another 15 percent quickly outlived the need for secrecy; and only about 10 percent genuinely required restricted access over any significant period of time.*"[17]

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[16] See: supra, at 10.

[17] United States Government Information Policies and Practices--The Pentagon Papers, Hearings before a Subcommittee of the House Committee on Government Operations, 92d Cong., 1st Sess., pt.1, at 12. As quoted in Gravel v. United States, 408 U.S. at 642 n.9 (emphasis added).

The Eleventh Circuit's Balancing of Public Interest Against Privacy Interest Requires No Further Review

As required under this Court's pronouncements pursuant to FOIA Exemption 6, the district court conducted a balancing of "the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

Applying that balancing test to the facts in this case, no facts have been shown or alleged that would lead any reasonable person to conclude that anyone's privacy would be harmed by release of the Haitians' names and addresses. There are only two reasonable possibilities raised by the government's invocation of the privacy issue.

The first possibility: if world media, Haitian refugees who flee their country in rickety boats at great peril, and Respondent Ray are correct, then political bloodshed in Haiti is a reality. Therefore, those Haitians returned to their homeland by the United States including the 582 Haitians referred to in the State Department's *Country Reports* - if any have survived - would have no concern for "privacy interests". Instead, these political refugees would want their status revealed in the hope that they could return to the United States as guaranteed by international and our own country's law.

The other possibility: if the State Department tells the truth that Haitians allegedly interviewed (whose names thus far have been kept secret at such extravagant government expense), live in a land where political repression is non-existent, then there is no reason in any of the State Department's arguments why those Haitians would object to such wonderful news about their homeland being given world-wide attention. They certainly would not claim that their "privacy" had been invaded. Indeed, as the trial court

remarked, "[i]t is hard for me to understand how they might expect retaliation from their government when the affidavits told how they were treated." SR2-10.

The district court clarified the balancing: "[t]he critical aspect is that an invasion [of privacy] be actual rather than just theoretical; it must be more than a mere possibility." (Pet. App. 28a) *citing Rose*, 425 U.S. at 380 n.19. The district court concluded that the legitimate public interest inherent in our country's immigration policy supports disclosure of the requested information. (Pet. App. 29a).

The Eleventh Circuit also conducted the balancing test, acknowledging privacy interests but finding that respondents' desire "to learn whether our government is honest to the public about Haiti's treatment of returnees * * * [is] of great public interest significant enough to outweigh the privacy interests of the Haitian returnees". (Pet App. 9a).

Both lower courts here considered in their balancing the State Department's alleged pledge of confidentiality. Both courts recognized that such a promise adds weight to the privacy interests at stake, but is not the controlling factor. (Pet. App. 7a, 28a). Both courts considered cases construing the pledge of confidentiality, and both still found the public interest here to be paramount.

Nevertheless, now the State Department would have this Court conduct yet another judicial balancing of the public interest against the privacy interests of the Haitians, and "suggests the [Eleventh Circuit] need[s] guidance from this Court in formulating a structured rather than an ad hoc approach to identifying and assessing the relevant privacy considerations." (Pet. 13).

The Alleged Pledge:
"Confidentiality"

Relying on a bald assertion that the interviews were allegedly conducted pursuant to a pledge of confidentiality, the State Department argues that the pledge ought to keep the names and identifying information exempt from the mandatory disclosure provisions of the Freedom of Information Act. (Pet. 13-15). Yet in the very case upon which the State Department relies the District of Columbia Circuit has recognized that "to allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate." *Washington Post Co. v. U.S. Dep't of Health and Human Services*, 690 F.2d 252, 263 (1982).

In this context, where the State Department maintains that returned Haitians do not face mistreatment, the district court noted that if those interviewed stated that they were not mistreated, "[i]t is hard to understand how they might expect retaliation". 2SR-10 Therefore, any pledge of confidentiality is not determinative of the degree of privacy invasion, when no mistreatment was reported.

"Conflicting" Decisions
Do Not Conflict

The State Department places great reliance on *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 1989) *cert denied* 110 S.Ct. 1805 (1990), because the *NARFE* court refused to order the disclosure of names and addresses of federal annuitants maintained in the files of the Office of Personnel Management. *NARFE* is readily distinguishable because the information to be released was essentially a mailing list, which the court found to be desireable as a commercial tool. The information would be "a list of qualified prospects for all the special goods, services and causes likely to appeal to financially secure retirees."

879 F.2d at 878.

The critical aspect of *NARFE* is that the court of appeals found "no public interest * * * and something, even a modest privacy interest, outweighs nothing every time." *Id.*
By contrast, here the Eleventh Circuit found that respondents here "have identified a very strong public interest". (Pet App. 13a).

The other case primarily relied upon by State Department is *FLRA v. Dep't of the Treasury*, 884 F.2d 1446 (D.C. Cir. 1989) *certs. denied*, 110 S. Ct. 863, and 864 (1990). There, too, the D.C. Circuit found that even though the public interest was slightly more than the "absolute zero" in *NARFE*, it did not rise to a level high enough to outweigh the federal workers' "significant interest in privacy". 884 F.2d at 1452, 1453.

The State Department also suggests that the Eleventh Circuit ruling here conflicts with *Heights Community Congress v. Veterans Administration*, 732 F.2d 526 (6th Cir.) *cert. denied*, 469 U.S. 1034 (1984). However, the Sixth Circuit found that the information requested in *Heights* was available from "other less controversial avenues to obtain the desired information." 732 F.2d at 530. No alternative avenues are available to obtain the information in this case.

The redacted portions of the documents are the only method to determine "what the government is up to" in this matter. Is the State Department disseminating propaganda to the public about the possible torture and murder of the Haitian returnees? Has the State Department concocted these "interviews" in order to justify its foreign policy goals, and to circumvent domestic and international refugee law?

Is the State Department being honest with the public when it states that it has conducted interviews with hundreds of Haitian returnees? Is the State Department credible when it states that the government of Haiti is honoring its commitment

not to persecute those Haitians whom the United States returns to the Haitian authorities? Is the State Department picture of political freedom in Haiti consistent with murders at the polling places, and the rest of the horrors known to world observers of the Haitian political scene?[18] Apart from "glib government assertions"[19] in the self-serving declarations of two State department employees, there is no evidence in this record, or anywhere to which respondents have access, to determine whether pledges of confidentiality were ever made.[20]

The release of identities of those people the State Department allegedly interviewed will provide either confirmation or concrete refutation of the State Department's broad public relations claims. Without these names and addresses, the State Department will have achieved a major public relations *coup*. The State Department will have succeeded in encouraging the media to report the State Department's message, and in denying the public the only opportunity to determine whether the State Department has been candid and told the American public, and the world, the truth.

Thus, by simultaneously stifling any real debate on the State Department's publicity campaign by denying public

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[18] See: e.g. n.13, supra.

[19] See e.g.: Perry v. Block, 684 F.2d 121, 126 (D.C. Cir. 1982) (Reliance on affidavits to demonstrate agency compliance with FOIA does not require courts to accept "glib government assertions".)

[20] The references to the alleged confidentiality pledge are sketchy. On this point the declaration of John Eaves states only that "those who were interviewed consented to the procedures with the understanding that their conversations with Embassy officers would be conducted under conditions of privacy and confidentiality." R2-52-EX at 4-5 ¶ 8. Similarly, the declaration of Richard H. Melton merely states that these persons were interviewed "on the understanding that their identities would be kept confidential. The interviewees generally were informed that the purpose of the follow-up interviews was to monitor the well-being of returnees." R4-88-5 ¶ 7.

access to the only method of verification and then disseminating the official State Department version of the truth, the spirit of the Freedom of Information Act is effectively extinguished.

The Eleventh Circuit Properly Determined State Department's More Than Two-Year Delay In Asserting Exemptions Amounted To A Waiver

The Eleventh Circuit recognized that the State Department had simply raised a smoke screen to hide behind, and this Court need not allow the State Department yet another opportunity to deceive the public simply by invoking the magical incantation "national security". Such "Newspeak"[21] bears the hallmark of a dictatorship[22] - not a democracy.

The State Department suggests that its unauthorized classification[23] of the documents in this case "constituted an intervening change in the governing factual and legal context of the case that warranted modification of the district court's injunctive order requiring disclosure." (Pet. App. 28-29)
Thus, the State Department tries to convince this Court that when the district court ruled that the Exemption 6 claim did not justify withholding in this case, this ruling triggered the

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[21] See: e.g. G. Orwell, Nineteen Eighty-Four, app (1949) ("The Principles of Newspeak").

[22] "Lying has always been a highly approved Nazi technique. Hitler in 'MEIN KAMPF', advocated mendacity as a policy. Von Ribbentrop admits the use of the 'diplomatic lie'. . . . Even Schacht showed that he, too, had adopted the Nazi attitude that truth is any story which succeeds. . . . he declared in justification-- 'I think you can score many more successes when you want to lead someone if you don't tell them the truth than if you tell them the truth.'" Office of Chief Counsel For Prosecution of Axis Criminality, Nazi Conspiracy and Aggression, United States v. Goering, at 43, 44 (Supp. A 1947); Closing Address for the United States of America, by Justice Robert H. Jackson. (emphasis added, footnotes omitted).

[23] See Executive Order 12356, § 1.6.

attempt to classify the documents, hence - abracadabra - the factual and legal context had changed!

The State Department seeks to have this Court ratify its pernicious approach to the Freedom Of Information Act to allow it to hide the "secret" stamp up its sleeve, so that if the district courts rule against it, State then can stamp the document(s) "secret". Then despite a district court's disclosure order, we have a new "Freedom of Secrecy Act".

The late Justice Stewart recognized that with the people and their representatives "reduced to a state of ignorance, the democratic process is paralyzed." He noted that Congress had initially "built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been." *EPA v. Mink*, 410 U.S. at 95 (Stewart, J. concurring).

Congress swiftly remedied what Justice Stewart called the "blind acceptance of Executive fiat." *Id.* We now have the Judicial Branch determine whether the Executive has complied with the prerequisites for a FOIA Exemption 1 claim. Here, both the district court and the court of appeals determined that by failing to assert the exemption sooner, the State Department waived the right to assert the exemption. (Pet. App. 13a-14a, and 32a).

The government seeks this Court's endorsement of its deliberate tactical decision to wait to classify the documents here until after the district court had ruled that State Department's other exemption claim was unwarranted. The State Department notes that unlike *Jordan v. Dep't of Justice*, 591 F.2d 753 (D.C. Cir. 1978) (en banc), the government here "did not invoke Exemptions 1 and 7 for the first time on appeal" (Pet. at 27, n.11). The government suggests by this argument that its conduct here "therefore was an occasion for even greater flexibility than *Jordan* might otherwise provide." *Id.*

Yet the court of appeals here considered *Jordan*, and found it did not apply here because *Jordan* provides "an appellate court has the discretion to reach the merits of a FOIA exemption not raised before the district court if the failure to raise it was due to pure mistake, the value of the material is very high, and it appears highly likely that the exemption does apply." (Pet App. 14a). The government has not met its very difficult burden under *Jordan*.

Even if the State Department had met the *Jordan* test, such post-ruling exemption claims are still a matter of discretion with the court. Both courts below considered the government's more than two-year delay here, and determined that the State Department was not entitled to have its untimeliness excused.

Ample Opportunities Will Exist For This Court To Revisit The Issues Presented Here After Other Courts Consider And Apply The Recent *Reporters Committee* Decision

The care with which the court of appeals considered the complex issues in this unique case militates against the grant of certiorari. The court of appeals did not make a blanket ruling affecting all cases where names and addresses are sought. This case is not like *NARFE*. The Respondents here are attempting to find out what our government is up to - whether State Department is lying to the public and sending political refugees back to possible torture and death and whether, in fact, State Department interviewed anyone - not simply to solicit membership in an organization as in *NARFE*.

In time, different factual situations will arise in the other circuit courts which have not yet had occasion to apply this Court's teachings in *Reporter's Committee*, and could provide a simpler vehicle to provide the guidance which the State Department seeks.

The State Department's arguments that the Eleventh Circuit has failed to follow this Court's decision in *Dep't of Justice v. Reporters Committee for Freedom of the Press, infra*, is belied by the Eleventh Circuit's ruling. The Eleventh Circuit carefully and painstakingly distinguished the differences between the cases. (Pet. App. 10a-12a).

The information sought in *Reporters Committee* did not shed any light on the government's conduct. Here, by stark contrast, the information would illuminate the State Department's conduct in its self-proclaimed "publicity" program and its thus-far secret "interviews".

Unless the government proposes to initiate a new style in its future Freedom of Information Act litigation of "withholding its most powerful cannon until after the the district court has decided the case and then springing it on surprised opponents and the judge" - as it has in this case - this Court would not need to expend its limited resources in order to determine the question of waiver.

As Justice Douglas cautioned, we should not forget the words of Madison:

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power which knowledge gives"[24]

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[24] Letter to W.T. Barry, Aug. 4, 1822, 9 The Writings of James Madison 103 (Hunt ed. 1910), as quoted in EPA v. Mink, 410 U.S. at 110-11 (Douglas, J. dissenting).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 90-747

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF STATE, PETITIONER

v.

MICHAEL D. RAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

KENNETH W. STARR
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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-747

UNITED STATES DEPARTMENT OF STATE, PETITIONER

v.

MICHAEL D. RAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents' brief in opposition is long on vituperation, short on analysis, and devoid of any answer to our submission that the issues presented are of substantial importance to the sound administration of the Freedom of Information Act (FOIA) and to the privacy and national-security interests that FOIA protects. On the Exemption 6 issues, the ruling below conflicts with *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), and with decisions of other courts of appeals. And in holding that the government was too late in invoking Exemptions 1 and 7, the court of appeals declined to follow the approach of the D.C. Circuit's en banc decision in *Jordan* v. *Department of Justice*, 591 F.2d 753 (1978). The Court should grant review to resolve these conflicts and differences in approach; to prevent injury to important privacy and national-security interests; and to announce concrete principles to guide decisionmaking in these two areas of FOIA litigation, replacing the ad hoc approach and unchanneled discretion exemplified by the decision below.

1. Respondents' pervasive allegations about State Department "propaganda" and "cover-ups" call only for a brief reply. Respondents requested summaries of interviews of Haitian nationals who had been returned to Haiti after attempting to enter the United States illegally. Far from "covering-up" the summaries, the State Department *released* them, deleting only the names or other information that would identify the interviewees. Those deletions conformed closely to *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976), where the Air Force submitted the summaries of disciplinary actions for *in camera* review, but deleted information that might identify the cadets involved—a practice this Court described in *Reporters Committee* as "unquestionably appropriate." 489 U.S. at 773. The reasons for the deletions are even stronger here than in *Rose*. Here, the interviewees received a pledge of confidentiality; in addition, the deletions further the national interest in protecting human rights by protecting sources of information on that subject.

Respondents nevertheless accuse (Br. in Opp. 3) the State Department of disseminating "propaganda" that "suggests that political repression in Haiti is nonexistent." See also Br. in Opp. 12-13, 14, 17, 21, 25. The State Department has suggested no such thing. To the contrary, it has repeatedly documented political repression and violence in Haiti.[1] It is precisely because of the history of repression in Haiti that the State Department interviewed returnees to ascertain whether they had been persecuted in retaliation for their attempted departure. The ability of the United States to gather such information, which furthers its ability to monitor and promote human rights in other countries, would be greatly

[1] These practices are documented in the State Department's annual *Country Reports on Human Rights Practices*, which are published as Joint Committee Prints by the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs. See the *Reports* for the years 1985 (at 571-581), 1986 (at 533-540), 1987 (at 510-519), 1988 (at 598-607), and 1989 (at 620-627).

undermined if the government were unable to honor a pledge of confidentiality and protect its sources of information.

Respondents even go so far as to question (Br. in Opp. 6, 20) whether the interviews "were, in fact, ever conducted," or whether the State Department instead "concocted" them to "justify its foreign policy goals" and "circumvent domestic and international refugee law." These wildly unfounded accusations are supported by not a scintilla of evidence suggesting that the interviews never occurred or that the summaries are false; and State Department officials in fact submitted formal declarations in this case, which the courts below obviously credited, explaining that the documents contain summaries of interviews that *were* conducted. See Pet. 2-7.

2. We have explained (Pet. 13-18) that the court of appeals undervalued the privacy interests protected by Exemption 6 in four specific respects. Undaunted, respondents assert (Br. in Opp. 17) that "no facts have been shown or alleged that would lead any reasonable person to conclude that anyone's privacy would be harmed by release of the Haitians' names and addresses." Briefly, our points are these:

First, the summaries contain personal details about many interviewees (marital and employment status, children, living conditions, and efforts to enter the United States) that, under the judgment below, would now be publicly linked with named individuals. As we have noted (Pet. 16), we are aware of no other case in which a court has ordered disclosure of such information. Respondents do not contend otherwise; they simply ignore this serious invasion of privacy.

Second, disclosure of the Haitians' identities would publicly identify them as persons who cooperated with the U.S. investigation. Pet. 15-16. Respondents do not deny that this invasion of privacy will occur, but seek to minimize it under either of two possible views of conditions in Haiti.

On the one hand, respondents argue (Br. in Opp. 17) that if they are correct that "political bloodshed in Haiti is a reality," the interviewees "would have no concern for 'privacy interests,'" but instead "would want their status revealed in the hope that they could return to the United States." Respondents' notion that the Haitian interviewees as a class have "no concern" for privacy interests is speculative, disrespectful of the individuals involved, inconsistent with representations in the State Department declarations about the need for confidentiality, and at odds with the assumptions underlying Exemption 6. It also cannot be reconciled with respondents' basic position in this case: if the returnees have been persecuted, as respondents insist, they presumably would not want their cooperation with the United States to be made public, for fear of further persecution. Accordingly, in asserting that the returnees would nevertheless want their identities disclosed, respondents are arguing not that there are no privacy interests at stake, but rather that those interests are outweighed by the returnees' own need to have the public know who they are. That, however, is an assessment to be made by the individual interviewees, who of course may publicly identify themselves at any time.

On the other hand, respondents claim (Br. in Opp. 17-18) that if the interviewees "live in a land where political repression is non-existent"—a view respondents attribute to the State Department—then "[t]hey certainly would not claim that their 'privacy' had been invaded," since they would not expect retaliation. This reasoning is also flawed. The State Department does not take the position that there is no political repression in Haiti (see page 2, *supra*); and although the interviews did not turn up instances of persecution specifically in response to attempted migration to the United States, the possibility of retaliation (or fear of retaliation) for cooperating with a U.S. investigation of that subject cannot be ruled out. Interviewees might also suffer embarrassment or hostility among family, friends, and fellow

nationals. See Pet. 5-6, 15-16. Respondents' contention that a person suffers no invasion of privacy interests protected by Exemption 6 unless the information disclosed is highly personal or negative was rejected by this Court in *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 600-601 (1982), and by the D.C. Circuit in *National Ass'n of Retired Federal Employees (NARFE)* v. *Horner*, 879 F.2d 873, 875 (1989), cert. denied, 110 S. Ct. 1805 (1990), and *FLRA* v. *Department of the Treasury*, 884 F.2d 1446, 1451-1452 (1989), certs. denied, 110 S. Ct. 863 and 864 (1990). See also *Ripskis* v. *HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (disclosure of favorable performance evaluation constitutes unwarranted invasion of privacy).

Third, the court of appeals "candidly acknowledge[d]" that respondents intend to track down and question the interviewees in Haiti, Pet. App. 7a, which would invade the distinct privacy interest encompassed by "the right to be let alone." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The court of appeals cited that prospect in concluding that "there are significant privacy interests at stake here," Pet. App. 8a, and other courts of appeals have reached a similar conclusion. See Pet. 17 n.9. Yet, respondents do not even mention the point.

Fourth, the privacy interests are greatly enhanced in this case by the fact that the interviewees were assured that their cooperation would be kept confidential. Pet. 13-15.[2] Respondents attempt (Br. in Opp. 19) to minimize this fact by quoting the observation in *Washington Post Co.* v. *HHS*, 690 F.2d 252, 263 (D.C. Cir. 1982), that "to allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate." But re-

[2] Respondents question (Br. in Opp. 18, 19, 21 & n.20) whether there was any such understanding. As they concede (Br. in Opp. 21 n.20), however, the declarations of two State Department officials represented that there was (see Pet. 3, 5), and both courts below concluded that the interviewees had been "promised" confidentiality. Pet. App. 7a, 28a.

spondents ignore the framework the D.C. Circuit prescribed for taking such a promise into account under Exemption 6. *Washington Post* made clear that "a government pledge of confidentiality, made in good faith and consistently honored, should generally be given weight on the privacy side of the scale," because it enhances the expectation of privacy. *Ibid.* And its holding was that "such a pledge should not be given determinative weight where the public interest in disclosure is high and the privacy interest in the information would otherwise be low." *Ibid.* It follows that in the converse situation presented here, where the public interest in disclosure is not great (see pages 6-7, *infra*) and the privacy interest in the information is independently very high, the pledge *should* be given determinative weight. Although the court below cited *Washington Post* for the proposition that a pledge of confidentiality does not "compel" withholding, Pet. App. 7a-8a, it declined to follow that decision's analytical framework.

b. On the public interest side of the Exemption 6 balance, respondents, like the court of appeals (Pet. App. 9a), do not dispute our submission (Pet. 19, 20-21) that disclosure of the Haitians' identities "would tell us nothing *directly*" about "the conduct of the *Department of [State]*." *Reporters Committee*, 489 U.S. at 774 (first emphasis added). That should be the end of the matter. The only relevant public interest under Exemption 6 is that of enabling the people to know "what their government is up to." *Reporters Committee*, 489 U.S. at 772-773 (Italics omitted).

As we have explained (Pet. 20-22), the court of appeals' novel derivative-use rationale for disclosure—that the requisite public interest is present because respondents plan to question the interviewees in order to assess the State Department's monitoring of Haiti's human rights record—is pure bootstrap. If accepted, it would eviscerate the protection afforded by Exemption 6. It apparently would, for example, require disclosure of a wide range of personal information that heretofore has universally been regarded as protected (such as the

cadets' names in *Rose*) whenever the requester asserts that he plans to use the information to investigate the governmental program—or, as in this case, whenever the requester alleges that documents already released to the public in redacted form are false. Respondents do not deny that this is the import of the decision below or refute our submission that the court of appeals' reasoning is incompatible with *Rose* and *Reporters Committee*. Respondents are content to rest once again (Br. in Opp. 18) on the court of appeals' erroneous finding of a public interest in their desire "to learn whether our government is honest to the public about Haiti's treatment of returnees." See Br. in Opp. 25. That will not do.

c. Review is warranted because, as we have explained (Pet. 22-24), the Exemption 6 holding below conflicts not only with this Court's decisions in *Rose* and *Reporters Committee*, but also with decisions of other courts of appeals. Respondents attempt (Br. in Opp. 19-20) to distinguish the D.C. Circuit's decision in *NARFE*, which sustained the withholding of the names and addresses of retired federal employees, on the grounds that disclosure would have led to commercial solicitations, and that the D.C. Circuit found no public interest in disclosure while here the Eleventh Circuit found a "strong public interest." Respondents ignore the actual holdings in *NARFE*.

The D.C. Circuit first held that release of the names and addresses would invade the individuals' privacy in two ways: it would disclose the defining characteristics of the people on the list, and it would lead, through solicitations, to interference with "the subjects' reasonable expectations of undisturbed enjoyment in the solitude and seclusion of their own homes." 879 F.2d at 876. Similarly here, disclosure would link the interviewees to the defining characteristics of the summaries (cooperation with a confidential U.S. investigation), and respondents' plans to track down and interrogate the interviewees would interfere with their quiet enjoyment of home and

hearth. On the other side of the balance, the D.C. Circuit held that there was no public interest under Exemption 6 in releasing the names to enable NARFE to further its lobbying efforts or inform the public about where annuity payments are going, because neither consequence would tell the public directly what the government is up to. *Id.* at 879. As the court below conceded, release of the Haitians' names likewise would tell the public nothing directly about what the State Department is up to. Pet. App. 9a. Accordingly, contrary to respondents' contention, if the court of appeals in this case had followed *NARFE*, it would have been compelled to sustain the withholding.

Respondents also dispute our submission (Pet. 17-18, 23) that the decision below conflicts with *Heights Community Congress* v. *Veterans Administration*, 732 F.2d 526, 530 (6th Cir.), cert. denied, 469 U.S. 1034 (1984). The central holding of *Heights Community Congress* is that disclosure of names and addresses to permit the requester to conduct face-to-face interviews is antithetical to the privacy interests protected by Exemption 6. 732 F.2d at 530. That holding cannot be reconciled with the decision below. Respondents assert that the Sixth Circuit found that the requested information "was available from 'other less controversial avenues to obtain the desired information.'" Br. in Opp. 20 (quoting 732 F.2d at 530). To be sure, the Sixth Circuit did observe: "Certainly nothing prevents [the requester] from publicly advertising its investigation and requesting any VA loan recipient who desires to cooperate * * * to come forward if he so elects, or pursuing other less controversial avenues to obtain the desired information." *Ibid.* But the court did not say in the last phrase, on which respondents rely, that there *were* such alternatives (much less rest its holding on that premise); it said only that the requester was free to pursue whatever alternatives there were. In any event, like the requester in *Heights Community Congress*, respondents are not precluded from "publicly advertising [their] investigation" and requesting any Haitian interviewee to cooperate "if he so elects." Thus, respondents' attempt to explain away the square conflict with *Heights Community Congress* is unavailing.

3. The court of appeals also erred in refusing to entertain, as untimely, the State Department's submission that the identities of the Haitian nationals are protected by Exemptions 1 and 7. The D.C. Circuit in *Jordan* identified relevant factors in deciding whether an appellate court may reach the merits of a FOIA claim that (unlike those at issue here) was never even raised in the district court: whether the failure to invoke the exemption was due to "pure mistake," whether the "value of the material" is "obviously high, *e.g.*, confidential information compromising the nation's foreign relations or national security," and whether it appears "highly likely" that the material is covered by the exemption. 591 F.2d at 780.

Respondents do not seriously dispute that the last two of the *Jordan* factors are satisfied (see Pet. 25-26), since they do not deny that disclosure of the identities of foreign nationals who furnish information about their government on a confidential basis will cause valuable sources of information to dry up, or that it is highly likely that the identities of the interviewees therefore are covered by the protection for confidential sources under Exemption 1 (incorporating Exec. Order No. 12,356, §§ 1.3(a)(5) and (9), 1.3(b)) and Exemption 7(D).[3] Pet. 27. Respondents do assert (Br. in Opp. 23) that the government made a "deliberate tactical choice" to wait to classify the documents until after the district court rejected the State Department's Exemption 6 claim. Re-

[3] Although respondents do not mount a particularized challenge to the facial validity of the classification, they allege (Br. in Opp. 13-16) that the State Department classified the names of the interviewees for an improper purpose—apparently, in their view, to cover up evidence of political persecution in Haiti. As we have explained (see pages 2-3, *supra*), however, there is no support for that allegation, and respondents cite none. An invocation of Exemption 1 that is otherwise proper under *Jordan* should not be rejected out of hand on the basis of such unsubstantiated allegations.

spondents do not and cannot cite any support for this assertion, and the record refutes it. As we have explained (Pet. 5-6, 26, 28), State Department personnel who first reviewed the documents did not appreciate the broader foreign-policy interests at stake. However, the materials were promptly classified when, after the district court rejected the State Department's Exemption 6 claim, the impending disclosure was brought to the attention of a high-level State Department official, who recognized the adverse impact on the Nation's foreign policy. Thus, the uncontradicted record establishes that the State Department's failure to classify and invoke Exemption 1 at an earlier time resulted from a "pure mistake." [4] The court of appeals' refusal to entertain the government's Exemption 1 and 7 claims therefore warrants review along with the Exemption 6 issues in this case.

For the foregoing reasons and those stated in the petition, we respectfully submit that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

FEBRUARY 1991

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[4] Quoting selected portions of a colloquy during the district court hearing on the government's motion to reconsider based on Exemption 1, respondents contend (Br. in Opp. 8-9) that the Justice Department attorney agreed that "there was no mistake in failing to classify the documents" the first time around. This contention is disingenuous. It is apparent from the colloquy as a whole that the Justice Department attorney was merely assuring the district court that the government was not accusing the *court* of having made a mistake in failing to sustain the withholding under Exemption 1, since the government had not previously relied on that Exemption. 4/12/89 Tr. 3-5.

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No. 90-747

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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF STATE, PETITIONER

v.

MICHAEL D. RAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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In the Supreme Court of the United States

OCTOBER TERM, 1990

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Civil No. 86-2430-CIV-HASTINGS

RAY, MICHAEL D., ETC., ET AL.

v.

THE UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1986		
Nov 26	1	COMPLAINT.
26	2	MOTION & ORDER (by Clk-11/26/86) APPTMT of Process Serv, Neil D. Kolner (EOD- 12/3/86).
26	3	SUMMONS Issd as to deft, U.S. Dept of Justice, by Pltf.
26	4	SUMMONS Issd as to deft, INS, by Pltf.
Dec 03	5	ORDER (ALH-12/1/86) Prel P/T Order (EOD 12/5/86-CCAP)
19	6	RETURN of summons exec as to deft United States Dept. of State, on 12/9/86
19	7	RETURN of summons exec as to deft U.S. Dept. of Justice on 12/9/86
24	8	SUMMONS issd as to Exec Office for Immigration Review.
24	9	FIRST Amended complt for declaratory & inj relief by pltfs.

DATE	NR.	PROCEEDINGS
1987		
Jan 9	10	MOTION to dismiss & memo of law by deft
22	12	MOTION for sanctions & memo in opp to defts' M/dism & memo, by pltf.
Feb. 4	13	REPLY memo in supt of defts' m/dism by defts, INS.
12	14	MOTION to stay disc./alt. for protective order & Memo., by Deft. INS.
13	15	MEMO in opp to defts. improper motion to stay disc. or for a protective order by pltfs.
17	16	RE-NOTICE of tkg. depo. of Marc Fisher. by pltfs.
19	17	NOTICE of tkg dpe of Marc Fisher on 2/25/87 by pltfs.
25	18	ORDER (ALH 2/24/87) Denying defts m/ to stay disc or M/ for Protective Order Regarding dep ot Marc Fisher on 2/27/87. Dep shall proceed as sched.
Mar. 9	19	NOTICE of supp auth by pltfs.
24	20	MOTION to certify suit a maintainable as a class action by pltfs. (EOD 3/24/87).
24	21	MEMO in supt of m/ to certify as maintainable as a class action by pltf. (EOD 3/27/87).
Apr. 3	22	MEMO In opp to pltfs' m/ for class cert by deft.
13	23	REPLY memo to INS' misrepresentation of law by pltf.
20	24	MOTION for s/j & memo by defts.
20	25	TRANSCRIPT of dep of Marc Fisher.

DATE	NR.	PROCEEDINGS
1987		
27	26	ORDER (ALH 4/24/87) GRanting m/ dism First AMended complt. Pltfs have 30 days to file Second amended complt. (EOD 5/5/87 CCAP).
30	27	RE-NOTICE of tkg. depo. of Alan C. Nelson, Commissioner of INS, on Thursday, May 12, 1987 at 2:00 p.m.
30	28	MEMORANDUM of law in opp. to deft's INS and Eori Sham M/M/S/J, by pltfs.
May 7	29	MOTION to quash subpoena & memo by Commissioner of INS.
11	30	VERFIED [sic] SUMMARY of testimony sought fgrom INS commissioner A. Nelson., by pltf.
13	31	MOTION & memo for ext of time to file amended complt, by Pltfs.
18	32	MEMO in opp to motn to quash subpoena of Alan Nelson, by Pltfs.
18	33	ORDER (ALH 5/18/87) GRANTING Pltfs' motn for ext to file amended complaint to 6/3/87. (EOD 5/21/87-CCAP).
19	34	RESPONSE to motn for ext of time to file amended complt, by defts.
20	35	REPLY Memo in supp of mont to quash subpoena of Alan Nelson, by defts.
June 3	36	SECOND amended compt for decaratory, injunctive & other relief; by pltfs
26	37	MOTION for enlgm't of time to resp to second amended complt by Defts.
Jul 2	38	ANSWER to complt by Defts.

DATE	NR.	PROCEEDINGS
1987		
2	39	ORDER (ALH 7/2/87) M/enlg time to resp to second amended complt GRANTED up to 7/3/87 (EOD 7/8/87CCAP).
27	40	REPLY to deft affirm defenses, by pltfs
Sept 24	41	MOTION to quash subpoenas & memo, by defts.
24	42	MOTION for S/J & memo, by defts.
25	43	ORDER (ALH 9/22/87) P/T order & notice of trial 2wk cal 2/22/88 cal call on 2/18/88. (EOD 9/30/87-ccap).
29	44	MOTION req. Deft State Dept release unedited doc and memo, by Pltfs.
Oct 5	45	NOTICE of filing Deft State Department's Edited Documents, by Pltf.
6	46	MEMO in opp to Pltfs mot for Order req Deft State Dept to release unedited Docs. by U.S. Immigration and Naturalization.
7	47	MEMO in opp to Defts mot for S/J. by Pltfs'.
7	48	MEMO in opp to Fefts [sic] mot to Stay Disc by Pltf.
7	49	MEMO in opp to Deft U.S. immagration service employees mot to quash subp & memo of law. by Pltfs'.
14	50	REPLY to all Defts memo in opp to Pltf mot for order req. State Dept to rel unedited docs. by Pltfs.
29	51	NOTICE of pendency of mot to certify class.
Nov 3	52	SUPPLEMENTAL mot for s/j & memo by defts INS, EOIR & U.S. Dept. of State.
13	53	NOTICE of depo of John Eaves on 11/30/87 by Pltf.

DATE	NR.	PROCEEDINGS
1987		
13	54	NOTICE of depo of Alan Nelson on 11/30/87 by Pltf.
16	55	MEMO in opp to Defts unauthorized suppl mot grounded on inapplicable law by Pltf.
18	56	MMOTION [sic] for a protect ordr, by Deft.
19	57	MOTION for order to compel sidcov, by Pltfs.
Dec 1	58	RESPONSE to mot for order to compel discovery by Defts.
1	59	MOTION to strike by Defts.
07	60	MEMO In Opp to M/Strike, by Pltfs.
07	61	REPLY Memo in Supp of M/Order to Compel Disc, by Pltfs.
15	62	MEMO in opp to Defts' mot for Protect Order by Pltf.
1988		
Jan 7	63	MOTION for an ext time which to complete disc & p/t order requirements & con of tr w/aff & memo by pltfs.
15	64	ORDER (ALH 1/13/88) Resetting trial for period of 6/13 to 6/24/88.
20	65	NOTICE of pendency of m/ to compel disc by pltfs.
20	66	NOTICE of pendency of m/ for an order req deft State Dept to release unedited document by pltfs.
20	67	MOTION for order to compel disc by pltfs.
Feb 12	68	VERIFIED mot for continuance of cal call & trial by Pltf.
May 16	69	NOTICE of pendency of verified motn for continuance Calendar Call & Trial by Pltfs.

DATE	NR.	PROCEEDINGS
1988		
16	70	EMERGENCY suppl motn for continuance of tial & Cal Call by Pltf.
18	71	NOTICE of pendency of prior notices of pendency of 1. Motion for an order requiring Deft to release unedited documents 2. motn to compel discovery & 3. motn to certify class. by Pltf.
25	72	UNILATERAL proposed P/T stip by Pltfs.
Aug 12	73	MOTION to strike answer & for judgment & memo, w/exhs, by pltfs.
18	74	RESPONSE to Pltf's motn to strike & for Judgment, by defts.
25	75	VERIFIED reply memo in sup of motn to strike ans & for judgment, by Pltfs.
Nov 29	76	NOTICE of pendency of motn to strike & for judgm,ent, by pltfs.
1989		
Feb 22	77	NOTICE of hrg. on all pend. motions on Wed. March 1, 1989 at 10:00 am, by clk.
27	78	MOTION for cont. on hrg. on all pend. motions, by deft.
Mar 3	79	ORDER (DWD 3/2/89) GRANTING s/j in favor of INS & EOIR, w/respect to the FOIA info requests explained or shown to be non-existent. The State Dept is required w/in 15 days of order to supply the redacted info contained in the seventeen documents; F/J as to State Dept is w/held until time period has expired & a——— has been made to the court that the names have been furnished to the pltfs, & if they have not, the court will take further appropriate action. (EOD 3/20/89-CCAP)

DATE	NR.	PROCEEDINGS
1989		
3	80	FINAL JDMT (DWD 3-2-89) GRANTING S/J in favor of INS & this action is DISMISSED on merits; GRANTING S/J in favor of EOIC Review & this action is also DISMISSED on merits. (EOD 3/20/89-CCAP)
13	81	MOTION to alter or amend jdmt, by pltfs'.
13	82	REQUEST for hrg on pltfs' Rule 59(e) mot to alter or amend jdmt, by pltfs.
13	83	MEMO in supp of pltfs' mot to alter to amend jdmt, by pltfs.
16	84	MOTION for enlrg of time to resp to court's order of 3/1/89, by deft US Atty.
17	85	MEMO in opp to defts' mot for enlrg of time to resp to court's order, by pltfs.
17	86	MOTION to alter or amend jdmt & memo, by defts.
30	87	NOTICE of filing of original aff. of Richard Melton, by Dexter A. LEE, AUSA
30	88	DECLARATION of Richard Melton.
30	89	MOTION for ext. of time to resp. to pltfs. m/ alter or amend judgment, by defts.
30	90	MEMORANDUM in opp. to defts m/alter or amend judgment, by pltfs.
31	91	MEMO in opp to m/elg time to resp to m/ alter judgmt, by Pltfs.
Apr 4	92	MEMO in opp to pltfs' mot to alter or amend jdmt, by defts.
4	93	SUPPLEMENTAL memo in supp of their mot to alter or amend jdmt, by defts.
6	94	NOTICE Of filing of orig aff of Pratt Byrd.

DATE	NR.	PROCEEDINGS
1989		
6	95	DECLARATION of Pratt Byrd.
Apr. 6	96	ORDER (DWD-FOR-ALH-4/6/89) DENYING pltfs. m/alter or amend judgment. This cause is set for oral argument on the remaning motions on Wed. Apr. 12, 1989 at 10:00 am. (EOD-4/12/89-CCAP)
12	97	MINUTES or oral argument on 4/12/89.
12	98	MOTION for *Pro Hac Vice* app & memo, by Pltf.
19	99	ORDER (DWD-4/13/89) 1. GRANTING Pltf's m/appear pro hac vice. 2. DENYING Deft's m/alter or amend. 3. COMPELLING State Dept to release unredacted docs w/in ten days of 4/12/89 o/a. (EOD 4/20/89-CCAP).
21	100	NOTICE OF APPEAL by deft U.S. Department of State from Oral Order rendered on 4/12/89 denying deft's mot to alter or amend jdmt & Order of 3/3/89 directing deft to disclose names of Hiatian returnees redacted from documents previously provided to pltfs (Copies to USCA & Attys of Record) (No fee required).
21	101	MOTION for stay pend. appeal, by deft.
21	102	MEMORANDUM in supp. of m/stay pend. appeal, by deft.
24	103	CORRECTED NOTICE OF APPEAL by deft U.S. Department of State from written Order rendered on 4/13/89 denying deft's mot to alter or amend jdmt & Order of 3/3/89 directing deft to disclose names of Haitian returnees redacted from documents previously provided to pltfs. (Copy to USCA). (No fee required).

DATE	NR.	PROCEEDINGS
1989		
May 2	104	ORDER (USCA 4/26/89) GRANTING Appellant's M/stay pending appeal. (USCA #89-5375)
16	105	SWORN MOTION for costs & attys. fees, by pltfs.
16	106	MEMORANDUM in supp. of m/attys. fees & costs, by pltfs.
June 2	107	MOTION for stay pending appeal, by deft USA.
2	108	MEMO in supp of M/stay pltfs' M/attys fees & costs, by deft USA.
2	109	MOTION for order granting costs & attys fees by default, by pltfs.
2	110	MOTION to require defts to order addl transc for ROA & memo in supp, by pltfs.
2	111	MEMO in supp of pltfs M/prder [sic] granting costs & attys fees by default, by pltfs.
16	112	NOTICE OF APPEAL by pltfs from F/J entered on 3/3/89, Order entered on 3/3/89 & Order denying pltf's mot to alter or amend jdmt entered on 4/6/89. (Copies to USCA & Attys of Record) (Fee paid—Receipt #63291—$105.00).
*14	113	RESPONSE to pltf's M/addl transc for ROA, by defts.
July 5	—	USCA ack rcpt of NOA, USCA case # 89-5375.
11	114	NOTICE (clk-7/7/89) to csl, purs Administrative order 89-34, date 7/6/89, case RE-ASSIGNED to cal of Hon James C. Paine.

DATE	NR.	PROCEEDINGS
1989		
26	115	ORDER (JCP7/25/89) DENYING, as moot, ptlfs mot to require defts to prd add'l transcripts. (EOD7/28/89)
9/24/87	116	MOTION to Stay Discov & Memo, by defts.
30	117	MEMO in opp to defts mot for Stay pend'g appeal, by ptlfs.
Sept 18	118	REPLY to pltfs opp to mot to Stay mot for atty fees & costs, by deft.
7	119	TRANSCRIPT of hrg on mot for S/J hld 3/1/89 before Jdg Dyer, pgs 1-44.
Oct 2	120	ORDER (JCP10/2/89) GRANTING defts mot to stay of mot for atty fees & costs til USCA issues opinion. (EOD10/3/89)
9/28/89	121	TRANSCRIPT of hrg before Hon David Dyer on 4/12/89.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5375

RAY, MICHAEL D., ETC., ET AL.

v.

THE UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/26/89	Stay Pending Appeal Granted
4/28/89	Flg. appellee's motion to vacate order of 4/26/89
5/8/89	Flg. appellants opposition to motion to vacate.
5/18/89	Flg. Order DENYING motion to vacate stay. GBT-RS-PAK
8/9/89	Flg. ltr, request for clarification of briefing schedule.
8/11/89	Flg. response of aple to clarification of briefing schedule.
8/16/89	Flg. Order: Initial Brief shall be filed by plaintiffs-appellees-cross-appellant. JLE ih
4-16-90	Flg. Government's Suggestion of Mootness of Plaintiffs' Non-Foia Claims. (CE'd) fd (Not a Motion)
5-7-90	Flg. Appellees' reply to Government's Suggestion of Mootness of Plaintiffs' Non-Foia Claims. (CE'd) fd

DATE	PROCEEDINGS
5-24-90	Flg. Appellant's Request to Take Judicial Notice (documentary items) (CE'd) fd
6/28/90	Flg. Order: Motion to take judicial notice is DENIED. PTF
8/27/90	Flg. appt. motion for stay of disclosure pending rehearing or alter. motion for stay pending certiorari.
8/28/90	Flg. response of apple. to motion to stay.
8/29/90	Flg. aple motion for extension of time to file petition for atty.
8/30/90	Flg. order: Appellees' motion for an extension of time in which to file motion for attorney's fees to and including Sept. 15, 1990, is GRANTED. (PTF).
8/31/90	Flg. Order: Appt. motion for stay of release is GRANTED. Government shall file immediately w/Clerk of court all the redacted information by NOON on TUESDAY Sept. 4, 1990. If information not received, the motion for stay is denied. If timely filed, the government has until September 14, 1990 to file whatever petitions it deems advisable.
9-14-90	Flg. Appellees' Motion for Attorney's Fees and Costs.
9-14-90	Flg. Appellants' Motion for Clarification and modification of August 30, 1990 order.
9/20/90	Flg. appt. motion to stay proceedings on attorneys' fees and for 30-day extension to respond to motion.
10/3/90	Flg. Order: Appt. motion to stay proceedings on attorneys' fees is GRANTED pending disposition of rehearing; 30-day extension to respond to attorneys' fees is DENIED; response is due 14 days after ruling on the rehearing; Aple's request for interim award of fees is DENIED.

DATE	PROCEEDINGS
10/2/90	Flg. response of Pay to attorneys' fees stay/extension.
10/9/90	Flg. Order: Motion for clarification/modification of 8/31/90 order is DENIED; Clerk is instructed to hold information under seal until ordered by the court to do otherwise. PTF-FMJ-GIBSON
10/24/90	Flg. Order: Stay of Mandate granted to and including 11/12/90. If neither a petition nor a further stay has been entered by this court or the Supreme Court, the Clerk is authorized to deliver redacted information to plaintiffs at noon 11/12/90. If a petition is filed by noon on 11/12/90, the stay will continue in effect until the disposition by the Supreme Court. If cert is denied, upon the filing of same with the court, the Clerk shall issue mandate and deliver redacted information to Plaintiffs.
10/29/90	Flg. appt. response to motion for attorneys fees.
11/8/90	Flg. aple's motion to file response to appt. reply on atty. fees.
11/16/90	Flg. appt. opposition to appt. 11/8/90 motion.
11/20/90	Flg. Order GRANTING aple's motion to file reply to appt. response.
11/20/90	Flg. aple. reply to appt. response on attorneys fees.
12/19/90	Flg. Order: Motion for atty's fees is HELD IN ABEYANCE pending disposition of petition for certiorari in the Supreme Court PTF-FMJ-GIBSON
3/4/91	Per Bruce Forrest (aplt's counsel), cert. has been granted.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 86-2430-Civ-HASTINGS

MICHAEL D. RAY, ESQUIRE, individually and as attorney for certain Haitian political asylum applicants, IVES AUDATE, JEAN HEVIL LOISEAU, and YVON NICOLAS, on behalf of themselves and all others similarly situated, PLAINTIFFS

vs.

THE UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION and NATURALIZATION SERVICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE IMMIGRATION JUDGE, and the UNITED STATES DEPARTMENT OF STATE, DEFENDANTS

SECOND AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

1. This is an action under the Freedom of Information Act (hereafter, "FOIA"), 5 U.S.C. section 552 as amended, and the Administrative Procedure Act, Title 5 U.S.C. sections 704 and 706, to order the production of agency records improperly withheld from plaintiffs, and for declaratory and injunctive relief.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. section 552 (a)(4)(B) and 5 U.S.C. sections 704 and 706, 28 U.S.C. sections 1331, 1361, 2201 and 2202, and pursuant to this Court's inherent equity jurisdiction. Plaintiffs request this Court (i) to declare unlawful defendants' dissemination of "disinformation" to the public and to the press in regard to the alleged physical safety of Haitian returnees to Haiti, (ii) to enjoin the final exclusion/

deportation hearings of the within class described below, and (iii) to stay the final orders of exclusion and deportation for the class members until at least six (6) months after the requested information is provided.

3. Plaintiff MICHAEL D. RAY, Esquire, is an individual citizen and an attorney for numerous (black) Haitian nationals who have applied for political asylum in the United States and who either (i) have applications pending before the Immigration Judges of the Department of Justice's EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, or (ii) have already been ordered excluded and/or deported by said agency.

4. Plaintiffs IVES AUDATE, JEAN HEVIL LOISEAU and YVON NICOLAS (hereinafter "Audate", "Loiseau" and "Nicolas", respectively, or "asylum applicants", collectively) are Haitian citizens who have applied for and are entitled to political asylum in the United States. Their cases are now pending befor immigration judges.

5. Defendant UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE (hereinafter "INS") is an agency of the United States, and has or should have possession of records establishing whether plaintiffs have legitimate fear of persecution if returned to Haiti. Defendant has, in fact, informed the press on more than one occasion that it does possess such records, and it is these records of defendants to which plaintiffs seek access.

6. Defendant EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE IMMIGRATION JUDGE (hereinafter "EOIR" or "Immigration Judges") is a division of the DEPARTMENT OF JUSTICE staffed with immigration judges who

hear deportation and exclusion cases and claims for black Haitian political asylum applicants filed pursuant thereto.

7. Defendant UNITED STATES DEPARTMENT OF STATE, is an agency of the United States and upon information and belief has possession of the records to which plaintiffs seek access.

CLASS ACTION ALLEGATIONS

8. This is a class action by plaintiffs seeking political asylum, filed pursuant to Fed.R.Civ.P.23(b)(2) on behalf of themselves and all others similarly situated.

9. The class of persons represented by the plaintiffs consists of all black Haitian citizens presently under exclusion or deportation proceedings, or under final orders of exclusion and deportation, or who will be under such proceedings or orders in time to join this class, and who have or who will present a claim for political asylum before the immigration judges.

10. The members of plaintiffs' class are so numerous that joinder of all members is impracticable. The exact size of plaintiff's class is not known, but the size of the class and the identification of its members is subject to determination through information within the control of defendants.

11. The questions of law and fact which are common to the plaintiffs' class include:

    1. whether any Haitian political asylum petitioner can receive a due process fair hearing on his/her claim without being provided factual information which is or should be possessed by the government concerning the fate of returnees/deportees to Haiti;

    2. whether defendants withhold material evidence relevant to plaintiffs' claims for political asylum, thereby prejudicing the asylum applicant in his/her opportunity to be heard and to present their claims;

    3. whether defendants, by withholding information requested pursuant to FOIA that may support plaintiffs' claims, effectively obstruct plaintiffs' rights to rebut the form letter STATE DEPARTMENT recommendations, almost universally against political asylum issued in response to each plaintiff's request for political asylum;

    4. whether defendants engage in illegal conduct by attempting to brainwash the public and immigration judges with false propaganda about the lack of persecution of those Haitians returned to Haiti by defendants in order to obstruct the laws respecting the grant of political asylum;

    5. whether defendants attempt through their false propaganda, thought control, and brainwashing of the public to crush dissent against their practices complained of herein;

    6. whether the conduct of defendants is racially motivated and directed against plaintiffs on account of their color which is black.

12. The claims of plaintiff are typical of the claims of the class, and the representative plaintiffs will fairly and adequately protect the interests of the class.

13. Defendants have acted on grounds generally applicable to all class members, and have refused to remedy their own non-compliance with FOIA requests, thereby making appropriate final injunctive relief and declaratory relief with respect to the class as a whole.

GENERAL ALLEGATIONS

14. The asylum applicants have been placed in proceedings before the EOIR, which conducts hearings in deportation proceedings and exclusion proceedings on applications for political asylum.

15. Pursuant to Federal law in every asylum case the STATE DEPARTMENT issues a recommendation letter for or against the granting of political asylum.

16. Audate has received a favorable recommendation from the STATE DEPARTMENT, while Loiseau and Nicolas, like almost every Haitian national seeking asylum in the United States, have received adverse recommendations.

17. Controlling and relevant Federal law also allows an alien requesting political asylum before the Immigration judge to have a reasonable opportunity to examine evidence against him, to present evidence in his or her own behalf and to rebut the STATE DEPARTMENT recommendation made in reference to his or her asylum claim.

18. The asylum applicants are entitled to political asylum in the United States pursuant to controlling law if they can establish in the courts of the defendants herein that they have a well-founded fear of persecution if returned to Haiti.

COUNT I. FOIA VIOLATIONS FOR FAILURE TO PRODUCE NAMES OF HAITIAN RETURNEES

19. The Director of the U.S. IMMIGRATION AND NATURALIZATION SERVICE (hereafter, "INS"), in Miami, Perry Rivkind, offered "to provide the names of 600 Haitians who have been sent back" to Haiti without so much as a "slap on the wrist", and alleged that nothing bad, no physical harm, had happened to them or to any other Haitian deportees,

according to a column written by Editor Howard Kleinberg in *The Miami News* on March 12, 1985.

20. Six days later, March 18, 1985, plaintiff/attorney MICHAEL D. RAY filed a FOIA request with INS requesting the reported list of 600 Haitian returnees promised by INS Director Rivkind to anyone who wanted it (copy of FOIA request and *The Miami News* article attached hereto as Exhibit A).

21. Seventy four (74) days later, May 31, 1985, INS answered plaintiffs' FOIA request—required in ten (10) days by law—by refusing to provide the list of 600 names, alleging instead, that "Mr. Rivkind has stated he was misquoted by *The Miami News*" (copy of INS' 5-31-85 FOIA response attached hereto as Exhibit B).

22. Upon information and belief, District Director Rivkind was not misquoted by the editor of *The Miami News*, and INS does, in fact, have said touted report on 600 Haitian returnees but refuses to produce the names as required by law, deliberately choosing instead to improperly influence public opinion by disseminating "disinformation" propaganda regarding the fate of Haitian returnees.

23. On February 17, 1987 defendant INS received a FOIA request filed by Audate requesting the reported list of 600 Haitian returnees promised by INS Director Rivkind. (copy attached hereto as Exhibit C).

24. On March 30, 1987 defendant INS answered AUDATE'S FOIA request without producing any names and by claiming again that District Director Rivkind "was misquoted by *The Miami News*." (copy of letter dated March 30, 1987 attached hereto as Exhibit D).

25. Upon information and belief Director Rivkind was not misquoted, and he does possess said names of returnees to Haiti.

26. On May 7, 1987 defendant INS received FOIA requests filed by Nicolas and Loiseau requesting the reported list of 600 Haitian returnees promised by INS Director Rivkind and copies of investigative reports to Haiti. (Copy attached hereto as Exhibit E). An acknowledgment of receipt of these requests stating that they were being processed has been received (copies attached hereto as Exhibits F and G), but no agency records requested have been received.

27. A Written FOIA Request for the 600 names was also forwarded by Plaintiff RAY to the STATE DEPARTMENT on June 12, 1985 upon the oral suggestion of Miami INS Assistant District Director of Management, George Waldroup, and was received by the STATE DEPARTMENT on June 15, 1985 (copy of certified return postal receipt attached hereto as H).

28. By law, the STATE DEPARTMENT was required to provide plaintiff with an answer to the June 12, 1985 FOIA request within ten (10) working days. Plaintiff Ray finally received an "answer" to his FOIA request almost two years later written by the STATE DEPARTMENT on March 10, 1987. (copy of STATE DEPARTMENT response attached hereto as Exhibit I).

29. In this March 10, 1987 "answer" the STATE DEPARTMENT concluded that they found no requested records and directed RAY to direct his request back to INS, where he had started two years previously.

30. Defendant STATE DEPARTMENT knew or should have known that this "answer" to the FOIA request concerning the names and addresses of Haitian re-

turnees is erroneous since, in its own Country Reports on Human Rights Practices for 1985 the STATE DEPARTMENT makes specific mention of its investigations and interviews of returnees.

31. Plaintiffs are entitled to access to the 600 names and reports thereon regarding the fate of Haitian returnees possessed by the STATE DEPARTMENT and INS, and the denial of such access by defendants is without lawful basis.

32. Plaintiffs have exhausted their administrative remedies pursuant to Title 5 U.S.C. section 552 (a) (6) (C).

COUNT II. FOIA VIOLATIONS FOR FAILURE TO PROVIDE REPORTS OF INVESTIGATORY TRIPS TO HAITI

33. An INS spokesman reportedly told *The Miami Herald*, "INS routinely sends inspectors to Haiti to interview people who have been returned by American authorities. In the most recent survey in September", he said, "failed emigres reported no persecution since their return". (Copy of *The Miami Herald* story, December 31, 1984, attached hereto as Exhibit J).

34. A FOIA request was filed with INS in Miami by plaintiff, MICHAEL D. RAY, on February 28, 1985, requesting copies and listings of the reports and trips to Haiti by INS inspectors identified in the preced- paragraph herein (copy of the 2-28-85 FOIA request attached hereto as Exhibit K).

35. Defendant INS failed to produce, within the ten (10) days allowed by law, copies of reports and lists of trips by INS inspectors to Haiti.

36. Instead, contrary to its lawful obligations under FOIA, Miami INS directed plaintiff to submit his

2-28-85 request to the STATE DEPARTMENT in Washington, D.C., twenty one (21) days later, on March 21, 1985 (copy of INS' non-answer to plaintiff's 2-28-85 FOIA request attached hereto as Exhibit L).

37. Upon information and belief, INS' tale to *The Miami Herald*, supra, was a figment of INS' imagination and deliberate propaganda to trick the public and the immigration judges into believing falsely that Haitians deported to Haiti were not persecuted, received not even "a slap on the wrist", and therefore had no lawful grounds for political asylum under controlling law.

38. The above-described false propaganda issued by defendants acting in concert denied the plaintiffs a fair due process hearing before the immigration judges.

39. On June 12, 1985 plaintiff RAY forwarded a copy of the above 2-28-85 FOIA request to the State Department where it was received on June 15, 1985 (copy of return receipt attached hereto as Exhibit H).

40. Almost two years later, on March 2, 1987 the STATE DEPARTMENT responded to the FOIA request claiming that "searches of all referenced record systems have been completed, and have resulted in the retrieval of no documents that are responsive to your request." (copy of letter dated March 2, 1987 attached hereto as Exhibit M).

41. On February 18, 1987, defendant STATE DEPARTMENT received a FOIA request filed by Audate (which was identical to RAY's previous request) requesting records of the investigatory trips to Haiti to determine what happens to Haitian returnees. (Copy thereof attached hereto as Exhibit N). An

"answer" to this request dated April 21, 1987 was received by plaintiffs. (copy attached hereto as Exhibit O).

42. Unlike the STATE DEPARTMENT response to RAY, Defendant STATE DEPARTMENT responded to Audate's request by stating that "Michael D. Ray has multiple FOIA request [sic] with the Department. Please be more specific in describing the records you are requesting."

43. On April 24, 1987 Audate resubmitted his FOIA request to the STATE DEPARTMENT for an appropriate answer. (copy attached hereto as Exhibit P).

44. On May 8, 1987 defendant STATE DEPARTMENT received FOIA requests filed by Nicolas and Louiseau requesting records of the investigatory trips to Haiti to determine what happens to Haitian returnees. (copies attached hereto as Exhibit Q).

45. In a letter dated May 21, 1987 the STATE DEPARTMENT, rather than providing the requested records, stated that it had completed a project of compiling documents "concerning Haitian Refugees", without specifying if the requested records were included in these documents, or when, if ever, these records would be made available to plaintiffs. (copy thereof attached hereto as Exhibit R).

46. If, in fact, the records sought by plaintiffs are contained in the documents referred to in said response of defendant STATE DEPARTMENT, the possession of those records by defendant contradicts its earlier statements that it did not have these records when RAY had requested them 2 years previously.

47. Plaintiffs are entitled to the list of trips and reports in the possession of the STATE DEPARTMENT and/or INS requested in their FOIA requests above, concerning what happens to Haitian deportees.

48. Defendants are required by law to provide said information within ten (10) working days of a FOIA request, and their refusal to do so is without lawful basis.

49. Plaintiffs have exhausted their administrative remedies pursuant to Title 5 U.S.C. section 552 (a)(6)(C).

COUNT III. REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF AGAINST UNFAIR ASYLUM PROCEDURES

50. Motions have been filed by plaintiff RAY before defendant EOIR to extend final deportation/asylum hearings of numerous Haitians on the grounds that the government has not answered the FOIA requests that are the subject matter of this particular lawsuit. Said motions have been denied by all five of the Immigration Judges in the Miami District. (One Miami immigration judge recently granted the motion but expressly only for *that* case and warned he would not grant such a motion for others).

51. Without being allowed access to the requested FOIA information, black Haitian political asylum applicants are unable to present material evidence in their political asylum hearings before the immigration court and therefore (i) are judged in a prejudicial hearing, (ii) suffer irreparable harm, and are therefore (iii) victimized on account of their race.

52. An almost universal result of said procedures by defendants is (i) the exclusion and deportation of black Haitians by defendants, and (ii) denial of their claims for political asylum and withholding of deportation.

53. The failure of EOIR to provide a hearing based on all relevant information known by them as well as the FOIA information defendants are required by

law to provide has caused irreparable harm to the plaintiff class and will continue to do so, in that other black Haitian refugees presently before the EOIR are likely to be deported as a result of defendants' recalcitrant failure to comply with the law and plaintiff's FOIA requests.

54. Defendants' (i) failures to honor the FOIA requests, (ii) failure to make available relevant evidence regarding the persecution of Haitian returnees, (iii) propaganda developed for public consumption and the (iv) false and/or non-existent statements made before the EOIR about how safe it is for Haitians to return to their homeland, may result in corporal or capital punishment to black Haitians upon their deportation and/or exclusion to Haiti.

55. Plaintiffs herein face immediate and irreparable harm in that they face imminent deportation to an unknown and perhaps deadly fate based on unfair procedures that do not comply with due process and federal law.

56. Defendants know from their own records that many of these Haitian plaintiffs are unemployed and/or too poor to pay legal expenses arising in any appeal of the final order of deportation and denial of their asylum claims or other possible federal court proceedings.

57. There is a strong and reasonable likelihood that plaintiffs will succeed on the merits in this case.

58. The information sought pursuant to the FOIA requests is possessed by the defendant(s) and is relevant and material to the claims for political asylum raised by plaintiffs and to the procedures required by due process of law in their hearings.

59. Any possible harm to the defendants is far outweighed by the benefits to be gained by plaintiffs in this case. There can be no harm caused to defend-

ants who are required under law to provide the information requested.

WHEREFORE, plaintiffs request this Court:

1. to take jurisdiction of this cause,
2. to order defendants to provide plaintiffs with the FOIA requested documents for the purpose of inspection and copying.
3. to expedite this proceeding as provided in Title 5 U.S.C. section 552(a)(4)(D).
4. to enjoin the final deportation and exclusion hearings of the members of the plaintiff class until such time as defendants have provided the FOIA requested information and for a period of at least six (6) months thereafter, so plaintiffs can study, analyze and verify defendants' reports as to what happens to returnees to Haiti,
5. to declare unlawful defendants' failure to provide the required information, and hearing procedures without such information,
6. to enjoin the dissemination of disinformation by defendants to the public and mass media concerning the fate of Haitian returnees.
7. to award plaintiffs their costs and reasonable attorney fees in this action, and to grant such other relief as this Court may deem just and equitable.

Respectfully submitted,

/s/ Michael D. Ray
MICHAEL D. RAY, ESQUIRE
Attorney for Plaintiffs
Miami National Bank
Building
8101 Biscayne Boulevard
Suite 500
Miami, Florida 33138

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Second Amended Complaint was caused to be served by mail this 3rd day of June, 1987 upon Mr. Brian O'Leary, Esquire Special Assistant U.S. Attorney, 155 South Miami Avenue, Miami, Florida 33130.

/s/ Michael D. Ray
MICHAEL D. RAY,
Attorney for Plaintiffs

Miami News Editorial Page 3-12-85

Howard Kleinberg
Editor

Returned Haitians' fate still controversial

One day U.S. Immigration Commissioner Alan Nelson, speaking with The Miami News Editorial Board, declared there has not been one documented case of persecution of a Haitian refugee who has been returned to his native country. The next day I received a report from Amnesty International which said, in part, "Amnesty International quoted eyewitness counts of such people (illegal departures) being arrested and beaten until they were bruised and bloody after bad weather forced their boat back to shore."

I don't mean to make light of such a serious subject, but this contradiction reminds me somewhat of watching an instant replay of an alleged pass interference penalty: Sometimes it looks like the defender really interfered, and other times it looks like he never touched the other guy. Nothing you see is conclusive.

Nelson and Miami INS district director Perry Rivkind made all the proper statements to shore up their argument that Haitians being sent back by U.S. authorities simply are allowed to blend into the countryside without so much as a wrist-slap for their efforts to flee to the United States.

To stress how much he believes that, Rivkind even offered to provide names of 600 Haitians who have been sent back so that doubters can go to Haiti and speak to the people directly.

He said he made such an offer to prominent Miami blacks not long ago when they spoke with him about their concerns for the returned Haitians. Bob Simms, former director of the Community Relations Board and now a public relations consultant, confirmed that Rivkind made

such an offer but said he did not accept it or turn it down. Instead, he claimed, he told Rivkind that national black leaders were more qualified than a Miami public relations man to conduct the Haitian inquiry.

(This evokes an old argument between me and Jesse Jackson. Jackson goes everywhere but Haiti: you can find him in Syria, Cuba, Nicaragua—but never in Haiti. Why?)

The allegation by Amnesty International of returning Haitians being beaten is but one of many claims in its report. Others deal with dissidents in the island who suffer arrest, tortue and political killing as well as disappearances and being held incommunicado for long periods.

For the record, Rivkind tried to be diplomatic about the Amnesty report but sounded defensive: "Perry Rivkind doesn't send people back to be hurt. If ever I hear of it, I'll go public."

Instead, he questioned the time period of the Amnesty International report. When I checked his claim, I found he was on target. Most dates used by Amnesty International in the short press release are in the late 1970s. The most recent date used was December 1982, although there was a reference to Amnesty receiving reports of 25 arrests in November 1984.

An Amnesty International spokesperson in New York confirmed that a lot of the information in the report is old. "What's new about it," she said, "is that Amnesty issued the report."

This is somewhat disappointing to those of us who previously have given special credence to Amnesty International reports.

But when the INS people contend the report is old, are they not also admitting that in the recent past, this type of activity did exist in Haiti?

And how long ago is "old"? Are we to believe that although there was torture in December 1982 there is

none now? That is what the State Department is contending in its annual report on other nations, issued on Feb. 14.

No political killings in Haiti in 1984, said State, no disappearances in 1984.

Why the sudden change since 1982?

As the lady from Amnesty said: "Some of the incidents may be old, but they ain't that old!"

U.S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

[Emblem]

7880 Biscayne Blvd.
Miami, Florida 33138
MIA870114

March 30, 1987
Mr. Ives Audate
1455 N.W. 195th Street
Miami, Florida 33169

Dear Mr. Audate:

Please refer to your Freedom of Information request, received by this office on February 19, 1987, for the indentification of the 600 Haitians referred to in the Miami News article by Howard Kleinberg, Editor, dated March 12, 1985. In regard to this reference, Perry A. Rivkind, District Director, Immigration and Naturalization, Miami, has stated that he was misquoted by the Miami News. You have also requested, if we cannot identify the aforementioned 600 Haitians, that we provide you with the identification of at least 200 other Haitians who have been deported within the past twelve months.

The records of the Immigration and Naturalization Service are indexed and maintained by name and alien or citizen or employee identification number. We do not maintain lists such as the ones you seek, therefore we do not have the records to satisfy your request.

We regret that we are unable to be of assistance to you in this matter.

Sincerely,

/s/ Margaret Snyder
MARGARET SNYDER
FOIA Assistant

The Miami Herald, Monday, December 31, 1984

INFLUX OF HAITIANS PUZZLES U.S. OFFICIALS

Calm seas or stormy politics: Everyone has an explanation

By MARC FISHER
Herald Staff Writer

In less than a week earlier this month, the Coast Guard intercepted 671 Haitian refugees making desperate journeys to the United States on four boats, including a workboat named Jerusalem and a freighter called Deliverance.

That's nearly as many Haitians as the Coast Guard captured in all of 1982 and 1983. It's also more Haitians than entered this country in those two years.

In the days following those episodes, 20 Haitians ran aground at the Julia Tuttle Causeway and hailed taxicabs to make their getaway. Two dozen Haitians crammed into a speedboat were caught after they docked at the 79th Street Causeway. And 18 more refugees from the impoverished island beached a rickety wooden powerboat near the nuclear power plant on Hutchinson island in St. Lucie County.

The Krome Avenue detention camp now holds 407 Haitian emigres, 86 of whom arrived within the past month.

Clearly, something has convinced a great many Haitians that now is the time to emigrate to the United States—in spite of the Coast Guard's vigorous interdiction program. In spite of an uncertain and probably gloomy legal future for Haitian immigrants, in spite of the Reagan administration's firm policy of confining arriving Haitians at Krome Detention Center.

The sudden influx of Haitians, stuffed onto flimsy boats with insufficient food and water, has caught the

U.S. government by surprise. A perplexed Immigration and Naturalization Service (INS) sent a team of investigators to Haiti early this month to figure out what's happening. The State Department sent its embassy in Port-au-Prince a flurry of queries asking why the boat people are setting sail for Miami.

Between them, the government and leaders of Miami's Haitian community have nearly a dozen theories explaining the influx. No theory is backed by much in the way of solid evidence. Each has its detractors.

Haitian exiles in Miami say the refugees are being pushed out by factors at home. Things must be getting worse in Haiti, either economically, politically or both, they say.

Federal officials say conditions in Haiti are lousy, but fairly stable. The United States is the magnet, they say.

And then there's the weather.

Forget politics, forget interdiction, forget the Haitians' legal status. What's causing the largest movement of Haitians since 1981 is calm seas, according to this theory.

"The weather is an important factor," said a State Department

Please turn to HAITIANS/3A

SUDDEN INFLUX OF HAITIANS PUZZLES U.S. OFFICIALS

Haitians!from 1A

official who spoke only when guaranteed anonymity. "Come January, the winds turn against sailors coming from Haiti. They had some uncertain weather in the early fall. Since then, the seas have been in their favor."

And INS spokesman Duke Austin said October and November "have historically been major months for immigration. That's the condition of the seas."

But Austin's own colleagues don't buy his explanations.

"We've had the same weather conditions the last three years and we've never experienced anything like this

before," said Leon Jennings of the INS Refugee, Asylum and Parole Unit. "This upsurge was not due to weather conditions."

The thory that draws the most widespread support is simple: As Haitian communities in Miami and New York City have grown and matured, Haitians are sending more money to relatives and friends back home. Along with the money, they send cassette tapes and letters telling of new jobs, schools, a higher standard of living—all the lures that have attracted immigrants for centuries.

A more-established Haitian community in the United States is also better able to provide newcomers with legal advice, health care and other help.

Henri-Robert Lamothe, executive director of Miami's Haitian Task Force, said the only plausible explanation for the influx "is the Haitian's view of the good life here and the bad conditions there."

"The more families settle here, the more others will be attracted to come here," said Perry Rivkind, director of the Miami INS office.

"The word is out that it's worth a try," the State Department source said. "If you make it to Florida, you're home free, you don't need a visa. If you get taken to Krome, you get taught English and get fed well. If you're caught by the Coast Guard, you're treated well and you're not prosecuted by the Haitian government when you're returned."

Whatever the reason, the fact of the influx is undisputed.

"There is a tremendous increase in efforts to come to this country," Rivkind said.

The Coast Guard's interceptions of Haitians at sea are way up: In 1982, they caught 152 Haitians. In 1983, it was 651. This year, through Dec. 3, a total of 3,706—with more than a third of them since November. And that's not including at least 400 Haitians captured on the way to Florida or upon arrival since Dec. 3.

INS' figures for Haitias who elude the Coast Guard and arrive in Florida have also drastically increased: The 1980 high of 15,093 Haitian arivals decreased to just 134 in 1982. In 1983, INS accounted for 333 Haitians. This year, the figure was 825 through November.

[Illegible] the Bahamas and other intermediary points is also on the rise.

> 'Traditionally, we have seen an increase in influx whenever there is political unrest in Haiti.'
>
> Roger Biamby,
> Haitian leader

Interceptions of Haitians at sea are way up: In 1982, the Coast Guard caught 152. Through Dec. 3 this year, 3,706 were caught.

In Miami, Haitian leaders say the influx may be even larger than government statistics reveal. Roger Biamby, executive director of the Haitian American Community Association of Dade (HACAD), said his organization has seen a sudden, large increase in requests for food packages and other aid.

"Traditionally, we have seen an increase in influx whenever there is political unrest in Haiti," said Biamby.

He said the government has recently launched a new effort to destabilize opposition churches and pastors. The State Department says reports from its embassy in Port-au-Prince indicate no such crack-down.

The Rev. Tom Wenski, director of Miami's Haitian Catholic Center, theorizes that the Haitian government is allowing more citizens to leave the country in an effort to pressure the United States into providing more aid. He says economic and political hardships in the island nation are worsening.

"It's a case where people who were on the edge of survival are being squeezed a little more," Wenski said. "The only way to go is out."

But experts on the State Department's Haitian desk and at INS say they know of no significant changes in policy by the government of President-for-Life Jean Claude Duvaller.

Haiti's consul general in Miami, Alexandre Paul, did not return The Herald's calls last week.

There are nearly as many theories about the influx as there are experts on Haitian immigration. Here are some possible explanations, along with arguments for and against each.

The Backfire Theory: The *Rev.* ——— -Juste, executive director of Miami's Haitian ——— Center, says the Reagan administration's interdictioin program is inadvertently causing more Haitians to flee [Illegible]

"By sending Haitians back, that creates more tension in Haiti, more people subject to persecution," he said. "Now the only alternative is to escape at any price."

But Jennings said INS routinely sends inspectors to Haiti to interview people who have been returned by American authorities. In the most recent survey in September, he said, failed emigres reported no persecution since their return.

The Simpson-Mazzoli Theory: Advanced by Gregory Smith, chief of immigration planning for the U.S. Cuban-Haitian Entrant Program, this explanation says that Haitians have heard that the successor to Congress' immigration reform bill is likely to be an early topic of discussion in the 99th Congress. Smith also said Haitians have heard news of the recent Cuban Adjustment Act and are hoping that they might be the beneficiaries of another, similarly helpful turn in their legal status in the United States.

Haitian leaders in Miami scoff at that theory, saying most immigrants are not attuned to the intricacies of U.S. politics. Don Loopey, INS' Haitian coordinator in Washington, said he tried but failed to find out what news Haitians were hearing when he visited the island a few weeks ago.

The Misinformation Theory: Widely accepted by government officials, this theory says that Haitians have believed for the past few months that the Coast Guard's interdiction efforts were put aside while the Guard's cutters and planes concentrated on an anti-drug smuggling campaign.

Though the Coast Guard has not shifted resources away from interdiction, the U.S. Embassy has reported that is exactly what many Haitians believe.

To combat the misimpression, U.S. representatives are asking Haitian newspapers and radio stations to announce that interdiction continues and that Haitians who make it to Florida will be detained at Krome.

INS official Jennings also said that Haitians in the United States are misleading their friends and relatives back home into thinking that they will flourish here. But Jean-Juste said that, to the contrary, he and other Haitians are encouraging their countrymen to emigrate only if they are facing political repression, not if they want to leave solely for economic reasons.

For whatever reason, the Haitians continue to flee their homes. Some are caught and returned. Some clog already-overcrowded Krome. Some slip through and disappear into exile communities in Miami and New York.

But some—no one knows how many—end up drowned in the Caribbean, victims of unscrupulous boat owners who play on their dreams of America. It is for their benefit, government officials say, that the new influx should be stemmed.

"Look at the number of boats the Coast Guard finds that are in really bad shape," the State Department source said. "We speculate that quite a few are ending up on the bottom of the Caribbean Sea."

Herald Staff Writer Yves Colon also contributed to this report.

[Emblem]

U.S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

7880 Biscayne Blvd.
Miami, Florida 33138

July 15, 1985

Mr. Michael D. Ray
Attorney at Law
Suite 202
7630 Biscayne Boulevard
Miami, Florida 33138

Re: Your letter of July 3, 1985 and telephone conversation of July 8, 1985.

Dear Mr. Ray:

This is to formally inform you of gross inaccuracies in your referenced letter.

Several points need reiteration to set the records straight regarding the paragraph in question as quoted by you on December 31, 1984 *Miami Herald* article: first, The Miami Herald did not directly quote Mr. Jennings; secondly, the Miami District Office *does not* routinely or otherwise send inspectors to interview Haitians who have been returned by U.S. authorities as such interviews are conducted by the American Embassy, Port-au-Prince; thirdly, any statements purportedly made by Mr. Jennings should be verified by Mr. Jennings.

The Department of State has reported that there have been no reports of persecution against Haitian nationals interviewed after their return under the Interdiction Agreement.

In regard to your statements of your Freedom of Information request, as you well know, there has been a change

in the staffing of that office and when your problem was brought to my attention it was handled promptly. Your negative FOIA response noted that no such documents existed in the Miami District Office and that our Central Office had given a similar negative response upon our inquiry. Furthermore, you were verbally informed by me to proceed to seek such information from the Department of State if you so desired.

I trust this will resolve misunderstandings or misconceptions you may have had.

Sincerely,

/s/ George M. Waldroup
GEORGE M. WALDROUP,
Assistant District Director

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 86-2430

MICHAEL RAY, ESQUIRE, individually and as attorney for certain Haitian political asylum applicants, IVES AUDATE, JEAN HEVIL LOISEAU, and YVON NICHOLAS, on behalf of themselves and all others similarly situated, PLAINTIFFS

v.

THE UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE IMMIGRATION JUDGE, and the United States Department of State, DEFENDANTS

DECLARATION OF JOHN EAVES

I, John Eaves, declare and state as follows:

1. I am the Acting Deputy Director of the Office of Mandatory Review of the Classification and Declassification Center (A/CDC) of the Department of State. In that capacity, I am responsible, *inter alia*, for the review of Department of State documents pursuant to the Freedom of Information Act, 5 U.S.C. 552 (FOIA). I am authorized to classify material to the Top Secret level and to downgrade and declassify national security information pursuant to Executive Order 12356 and Department of State regulations set forth in 22 C.F.R. Section 9.14. I have personally reviewed the portions of documents withheld from release by the Department of State

in responding to the plaintiffs' requests and described in this declaration. I make the following statements based on that review, on my personal knowledge and professional judgment, and on information made available to me in the performance of my official duties.

2. I am familiar with the subject litigation and the requests filed under the Freedom of Information Act with the Department of State by Messrs. Michael D. Ray, Ives Audate, Jean Hevil Loiseau and Yvon Nicolas. I submit this declaration to demonstrate that the information withheld is properly exempt from release under FOIA. The documents at issue are submitted as attachments 1 through 17 to this declaration.

3. In response to Mr. Ray's FOIA request, dated June 10, 1985, identified hereafter as FOIA Case No. 8502478, the Department reviewed 25 documents that were found in its files and identified as relevant to the request. Upon completion of this review, eight documents were released in full and seventeen documents were released with excisions. (See letter to Mr. Ray, dated July 3, 1987, Exhibit A.) The Department found no documents responsive to a second FOIA request filed by Mr. Ray dated June 10, 1985 (FOIA Case No. 8502479). This request is addressed in the declaration, dated September 22, 1987, which was submitted by Mr. Frank M. Machak, Chief of the Information Access and Services Division of the Foreign Affairs Information Management Center of the Department (FAIM/IS).

4. The Department subsequently received a FOIA request from Mr. Ives Audate, dated February 11, 1987 (FOIA Case No. 8700798), for the same documents which had been released to Mr. Ray. Accordingly, the Department responded to Mr. Audate by releasing in full the same eight documents and the same seventeen documents with excisions that it had released to Mr. Ray. (See letter to Mr. Audate, dated September 3, 1987, Exhibit B.)

5. The Department received a FOIA request filed jointly by Jean Hevil Loiseau and Yvon Nicolas, dated

May 6, 1987 (FOIA Case No. 8702233). This request was identical to the previous FOIA request submitted by Mr. Ray, and the Department responded by releasing in full the same eight documents and in part the same seventeen documents to Messrs. Loiseau and Nicolas that it had released to Mr. Ray. (See Department's letter dated September 17, 1987, Exhibit C.)

6. The Department of State carefully reviewed the seventeen documents withheld in part in the three requests identified above and has released all information not subject to an exemption. All withholding of information as a result of this review was based on a single FOIA exemption: (b)(6).

7. The seventeen documents which previously were withheld in part were reviewed again in connection with this litigation. A small amount of previously withheld information was released from sixteen of them to Messrs. Ray, Audate, Loiseau and Nicolas in letters dated October 19, 1987 (Exhibit D.) This information, while incidental and nonsubstantive, is reasonably segregable from the personal identifying information that continues to be withheld from the documents under Paragraph (b)(6) of Section 552.

8. *Exemption (b)(6)—personal privacy.* FOIA exemption (b)(6) exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Deletions of names and identifying information have been made in documents in this case to protect the privacy of Haitians who consented to interviews by Embassy officers following their return to Haiti after failed attempts to enter the United States without documentation. The interviews were required to ascertain whether the Haitian Government was submitting returned Haitians to harassment or ill treatment. While no evidence of harassment or other ill treatment of the returned Haitians was reported, those who were interviewed consented to the procedures with the understanding that their conversations with Embassy officers would be conducted under conditions of privacy and confidentiality. To disclose the identities of these individuals would not only betray their trust in our discretion, it would also subject them or their families to possible embarassment in their social and community relationships. This would be a clearly unwarranted invasion of the privacy of the individuals concerned. The FOIA (b)(6) exemption has been invoked to prevent individuals or their families from being thus exposed. In all instances in which this exemption is asserted, I have carefully weighed the privacy interest of the individuals against the public interest in disclosure, and have determined that the former outweighs the latter.

9. One document (No. 71) was released to Mr. Ray, and subsequently to Messrs. Audate, Loiseau and Nicolas, with the notation "RXN". "RXN" is an internal usage which signifies that material extraneous or irrelevant to the request has been deleted from a document which has otherwise been released in full. It has been our practice to inform the requester whenever irrlevant material has been excised. Through inadvertence, a sentence explaining the "RXN" notation on document 71 was omitted in our letters to Messrs. Ray Audate, Loiseau and Nicolas.

10. A description follows of each of the seventeen documents withheld in part.

Document Nos. 12, 18, 20, 21, 46, 49, 54, 56, 57, 58, 62, 64, 67, 70, 72, 73, 74 (Attachments 1 through 17).

Attachment No. 1. Document No. 12 is a Memorandum to the File, dated July 1, 1983 from the Returnee Officer at the United States Embassy at Port au Prince, Haiti. Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 2. Document No. 18 is a Memorandum to the File, dated October 18, 1983 from a Political Officer at the United States Embassy at Port au Prince, Haiti. Five pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 3. Document No. 20 is a Memorandum to the File, dated December 8, 1983 from a Political Officer at the United States Embassy at Port au Prince, Haiti. Twenty-one pages. Originally and currently *UNCLASSIFIED*. Withheld in part.

Attachment No. 4. Document No. 21 is Telegram No. 0082, dated January 9, 1984 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to: Coast Guard District Seven, Miami, Florida; the Immigration and Naturalization Service Headquarters, Washington, D.C. and its Office in Miami, Florida; Commandant, United States Coast Guard; Coast Guard Cutter Hamilton; and Commander, United States Forces Caribbean, Key West, Florida. Six pages. Originally and currently LIMITED OFFICIAL USE. Withheld in part.

Attachment No. 5. Document No. 46 is Telegram No. 6055, dated October 26, 1984 from the United States Embassy at Port au Prince, Haiti to the Department of State. Three pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 6. Document No. 49 is Telegram No. 6466, dated November 21, 1984 from the United States Embassy at Port au Prince, Haiti to the Department of State. Three pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attacment No. 7. Document No. 54 is Telegram No. 6892, dated December 14, 1984 from the United States Embassy at Port au Prince, Haiti to the Department of State, with an information copy to the Immigration and Naturalization Service Office at Miami, Florida. Four pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 8. Document No. 56 is Telegram No. 6992, dated December 18, 1984 from the United States Embassy at Port au Prince, Haiti to the Department of State, with an information copy to the Immigration and Naturalization Service Office at Miami, Florida. Six

pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 9. Document No. 57 is Telegram No. 251, dated January 15, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven Headquarters at Miami, Florida. Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 10. Document No. 58 is Telegram No. 444, dated January 24, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven Headquarters at Miami, Florida, Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 11. Document No. 62 is Telegram No. 1104, dated February 27, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven, at Miami, Florida. Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 12. Document No. 64 is Telegram No. 1336, dated March 12, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven at Miami, Florida. Four pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 13. Document No. 67 is Telegram No. 1563, dated March 20, 1985 from the United States Embassy, at Port au Prince, Haiti to the Department of

State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven, at Miami, Florida. Five pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 14. Document No. 70 is Telegram No. 1752, dated March 28, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven Headquarters at Miami, Florida. Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 15. Document No. 72 is Telegram No. 2266, dated April 25, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven Headquarters at Miami, Florida. Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 16. Document No. 73 is Telegram No. 2387, dated May 3, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven at Miami, Florida. Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 17. Document No. 74 is Telegram No. 2899 dated May 29, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven Headquarters at Miami, Florida. Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 21st day of October 1987.

/s/ John Eaves
JOHN EAVES

[Attachments 1-6 Omitted in Printing
and Lodged with the Court]

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Nos. 86-2430-CIV-ALH
and 87-2087-CIV-ALH

MICHAEL D. RAY, PLAINTIFF

vs.

U.S. DEPARTMENT OF JUSTICE, ET AL., DEFENDANTS

Miami, Florida
March 1, 1989

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID DYER

APPEARANCES:

For the Government:

MICHAEL D. RAY
In Pro Se

For the Defendants:

LYNN SUMMERS,
Assistant U.S. Attorney

* * * *

[24] THE COURT: What do you have to say about the redacted statements?

MS. SUMMERS: Once again, Your Honor, I have not personally reviewed them.

THE COURT: The only thing that is redacted in [25] them is they failed to disclose the names of the people from whom the statements were taken.

MS. SUMMERS: I understand, and my response to that is that the plaintiffs' purposes would not be advanced with the mere information as to those names, without some other information as to where those people could be found.

* * * *

[34] THE COURT: Well, I am going to go ahead and rule in this case, and so that the record will be complete, I want to have the record indicate the basis for my ruling.

* * * *

[35] But there is a claim for exemption, which are the seventeen statements, the names of which have been redacted.

The Freedom of Information Act request triggers a claim of exemption under the Act, and the burden is on the government agency to demonstrate the basis for the non-disclosure.

A justiciable issue remains to be decided, and that is the propriety of the State Department's claim of [36] exemption under 552(b)(6) because the District Court must do something more to assure itself of the factual basis and the bona fides of the agency's claim of exemption than rely solely upon an affidavit.

There is a presumption, under the Freedom of Information Act, that government documents held by a government agency are subject to disclosure.

There must be a detailed proof that the disclosure would defeat, rather than further, the purposes of the Freedom of Information Act, and whether the disclosure constitutes a clearly unwarranted invasion of privacy, the Court must employ a balancing test weighing the individual's right to privacy against the public interest in disclosure of the government information.

The degree of invasion of privacy considers the potential harm to the individual from disclosure of the information. The critical aspect is that an invasion be actual rather than just theoretical. It must be more than a mere possibility, and the agency's promise of confidentiality to the submittor of information is insufficient to defend against disclosure.

In this instance, the INS has responded that it did not conduct an—that it did not conduct investigatory trips to Haiti, nor have in its possession investigative reports.

[37] It also has maintained, by its answer, that the list of six hundred Haitians does not exist.

I think the record fails to disclose that the records have been improperly withheld or that they, indeed, exist.

Also, the record indicates there have been no requests directed at EOIR, and, therefore there is no issue before me in connection with that party.

As I have indicated, I think the Robles case holds that the promise of confidentiality is insufficient. I find it difficult to see how that disclosure in this case could cause the plaintiffs any harassment, embarrassment or danger, and this country's immigration policy supports a finding that the public has a legitimate interest in the save re-location of returned Haitians.

I think any invasion of privacy from the mere act of disclosure of names and addresses would be de minimis and little more than speculation, and the promise of confidentiality by the State Department is only one factor to be considered and not determinative of the outcome.

Weighing the public interest against the private interest, the balance tilts in favor of disclosure of the names, because any intrusion into the privacy of the Haitian Nationals would be minimal.

I am, therefore, going to require the government, [38] within fifteen days, to supply the redacted information in the seventeen documents.

MR. RAY: Thank you.

THE COURT: I am going to grant the summary judgment with respect to the information sought and explained or shown to be non-existent.

I am going to withhold entering of any judgment, however, until the fifteen days has expired and a showing has been made to this Court that the names have been furnished to the plaintiffs, and, if they have not, then I will take further appropriate action.

That is all.

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 86-2430

MICHAEL D. RAY, ESQ., ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS

DECLARATION OF RICHARD H. MELTON

I, Richard H. Melton, declare and state as follows:

1. I am the Deputy Assistant Secretary for Inter-American Affairs. In this capacity I assist the Secretary of State in providing overall direction, coordination, and supervision of interdepartmental activities within this geographic area. I am responsible for ensuring the adequacy of U.S. policy for the countries within the Caribbean region, and for the plans, programs, resources, and performance for implementing that policy. My duties include supervision of the Department's policy and operations with respect to Haiti, as well as other Caribbean countries. I am familiar with the facts of this case and have reviewed the documents which are the subject of this litigation.

2. I submit this declaration in support of the government's Motion for Reconsideration of the court's order of March 3, 1989, requiring the Department of State to disclose the names of those Haitians who were interviewed by U.S. Government personnel following their interdiction at sea and return to Haiti. These persons

were interviewed approximately six months after their return to Haiti about the experiences they had had since their return and the conditions under which they were living, on the understanding that their identities would be kept confidential. Protection of the identities of confidential sources of information is essential to the U.S. government's ability to enforce its immigration laws and successfully carry out the foreign policy interests of the United States.

3. On September 23, 1981, the Government of the United States entered into a law enforcement agreement with the Government of Haiti to stop the illegal migration of Haitians to the United States. (The Agreement is attached as Exhibit 1.) That agreement provided for various cooperative law enforcement measures, including the interdiction by U.S. Government authorities of Haitian flag vessels on the high seas, inquiries regarding the status of those on board, and the return of the vessels and persons aboard to Haiti if a violation of U.S. or Haitian law is discovered. The agreement included an undertaking by the Government of Haiti not to prosecute for illegal departure any of the returnees who are not traffickers. The U.S. Government stated its intention in the agreement not to return any Haitian migrants "whom the United States authorities determine to qualify for refugee status." The U.S. Government has a strong desire to see that all elements of the law enforcement agreement are carried out, and related U.S. interests are advanced.

4. On September 29, 1981, the President issued Executive Order 12324 on the "Interdiction of Illegal Aliens," (attached as Exhibit 2) which instructed the Secretary of State to enter into "cooperative agreements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea." The Order also instructed the "Department in which the Coast Guard is operating [to] issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens and the interdiction of any defined vessel carrying such aliens." The Order stated that the Coast Guard shall "stop and board vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action." The Order stated further that the vessel and its passengers shall be returned to the country from which it came "when there is reason to believe that an offense is being committed against the United States immigration law, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that no person who is a refugee will be returned without his consent."

5. For important foreign policy reasons, the United States Government also has a very strong political interest in assuring that no person, except traffickers, returned by the Coast Guard to Haiti is prosecuted, persecuted, or otherwise mistreated by the authorities for his departure. The United States plays a leading role in assuring humanitarian treatment of migrants and refugees in all parts of the world.

6. The Department of State has found it necessary in the past and may find it necessary in the future to interview certain Haitians returned by the U.S. Coast Guard after being interdicted at sea in order to ascertain whether they have been persecuted or otherwise mistreated, or were prosecuted by the Government of Haiti for their departure. The United States has conducted these interviews to assure that Haiti's undertaking under the 1981 Agreement not to prosecute returnees who are not traffickers has been carried out. Such interviews also provide the United States with valuable information about conditions in Haiti and provide means of verifying whether the screening measures instituted pursuant to the Presidential Order to ensure that *bona fide* Haitian refugees are not returned to Haiti without their consent are effective. Finally, such interviews have been essen-

tial to assure that important U.S. foreign policy objectives are being met by the Haitian interdiction program.

7. The procedures for obtaining the interviews was as follows. When a vessel was interdicted and it was ascertained that the persons on board did not have a *bona fide* claim for refugee status, the vessel and its passengers were returned to Haiti. Upon arrival in Port-Au-Prince, an embassy official obtained the names and addresses of all returnees. Department of State personnel from the Embassy conducted follow-up interviews with the returnees, usually about six months after their return. All interviews were undertaken for the purpose of determining the treatment the returnees have received from the government of Haiti after or as a result of their return to Haiti. The officers were instructed to visit several towns in different parts of the country in order to ensure a representative sample. About 27% of the returnees were located and agreed to be interviewed. The interviews in this case were conducted with the clear understanding that they would be held confidential. The interviewees generally were informed that the purpose of the follow-up interviews was to monitor the well-being of the returnees.

8. If the names of these returnees were to be released to the public, subjecting them to harassment and questioning by strangers, word would quickly spread that the United States cannot be trusted to protect the identity of sources of information. Without this essential trust, the United States could lose its ability to monitor conditions under which persons returned to Haiti are treated, thereby undermining one of the principle undertakings of the agreement, rendering compliance with the Presidential Order uncertain, and jeopardizing important foreign policy objectives. Other Haitians or third country nationals on whom the United States relies for candid and frank assesments of internal conditions would be reluctant to believe in a U.S. promise of confidentiality, and thus no longer be willing to provide the U.S. information

it needs to effectively conduct law enforcement programs or to attain foreign policy objectives.

9. I believe that release of the names of these sources of information necessary to the successful conduct of U.S. foreign policy could reasonably be expected to cause damage to the foreign relations of the United States and therefore meet the criteria for classification under Executive Order 12356 1.3(a)(5). I have requested a review of the documents for classification pursuant to section 1.6(a) of the Executive Order.

10. If Haitians interviewed had been aware that their names and statements could be made public and might be used in political asylum proceedings, either on behalf of or against fellow Haitians, the interviewees might have been far less candid in nature. Had the U.S. government not been able to assure confidentiality of the names of interviewees, the United States would have been severely handicapped in its ability to obtain the information necessary to assess the success of its agreement with Haiti and the interdiction program.

11. Inability to preserve the confidentiality of sources of human rights conditions in foreign countries would also jeopardize the Department's ability to monitor human rights conditions in countries under sections 116(d) and 5023(b) of the Foreign Assistance Act of 1961, as amended. Furthermore, the Department's ability to render informed advisory opinions in asylum cases pursuant to 8 C.F.R. 208.7 would be constrained.

12. Without the ability to maintain confidentiality of names of persons who attempt to leave their country of origin, the U.S. political asylum and refugee programs would become jeopardized. Persons who might otherwise approach an embassy official with a claim of persecution, might fail to do so because of a fear that the claim could be made public. Our humanitarian and foreign policy interests in maintaining viable refugee and political asylum programs could be severely damaged.

13. In providing reports of interviews with the names expunged, the U.S. has given plaintiffs as accurate a ren-

dition of the conditions in which the interviewees found themselves at that time that the U.S. itself has. No effort has been made to expunge information other than identities. Plaintiffs have made no showing that the interview records are not accurate.

14. In addition to the demonstrated U.S. Government interest in protecting identities, there is good reason to believe that disclosing the names to plaintiffs will not have significant effect on the political asylum proceedings in connection with which the plaintiffs intend to use these names. The reports at issue here reflect interviews that took place at the latest in 1985. Conditions in Haiti have changed significantly since that time. In addition, it is likely that many interviewees can no longer be found in the same location. Thus release would result in damage to the U.S. credibility without any real benefit to present-day asylum seekers.

15. Moreover, the United States evaluates claims of political asylum based on current conditions in the country, and these interview reports, now between four and eight years old, are not a major factor in evaluating present conditions in Haiti and hence current claims for political asylum. Thus the public benefit to be gained from release of the names of the interviewees is likely to be minimal.

I declare that the foregoing is true and correct.

/s/ Richard H. Melton
RICHARD MELTON

17 March 89
Dated

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 86-2430

MICHAEL D. RAY, ESQ., ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL., DEFENDANTS

DECLARATION OF PRATT BYRD

I, Pratt Byrd, declare and state as follows:

1. I am the Acting Deputy Director of the Office of Mandatory Review in the Classification and Declassification Center (CDC") of the Department of State. In this capacity, I am responsible for the review of Department of State documents pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552. I am authorized, as a Top Secret classification authority, to classify information up to and through the level of Top Secret, and to downgrade and declassify national security information pursuant to Section 1.2 and 3.1 of Executive Order 12356 and Department of State regulations 22 C.F.R. 9.14. I make the following statement based on my personal knowledge and upon information made available to me in the performance of my official duties.

2. I am familiar with the Freedom of Information requests which are the subject of this litigation. I am filing this declaration to explain the recent classification of the names of Haitian returnees who were interviewed

in 1983, 1984 and 1985, with respect to their situation following their return.

Preliminary Statement

3. The documents at issue in this case were retrieved in 1987 and were reviewed at that time by CDC, which is staffed by experienced Foreign Service officers who have retired from the Service. These re-employed annuitants fully devote their time to review of documents under the various information access laws and regulations. These officers possess in-depth knowledge of the Freedom of Information Act and other information access statutes as well as Executive Order ("E.O.") 12356 governing classification. These officers, furthermore, have been endorsed by one or more of the Department's Bureaus to handle review of FOIA and Privacy Act requests of interest to their Bureaus.

4. When CDC first reviewed the documents in the late summer of 1987, it diligently sought background information on the Haitian returnees program pursuant to which the interviews were conducted, but was able to obtain only limited information. Based on the information material available to it and the documents themselves, it was CDC's determination that the names of the returnees interviewed should be withheld under Exemption 6 because their release, in the context of the interviews, would constitute an clearly unwarranted invasion of the personal privacy of those to whom the interview records pertain. This determination was set forth in the Declaration of John Eaves, dated October 21, 1987, and filed in support of Defendant's Supplemental Motion for Summary Judgment.

5. In early March of this year, after the Court expressed its intent to rule against the Department and order release of the names, the issue of whether or not to disclose the names was presented to the Acting Assistant Secretary for Inter-American Affairs. He examined the issue and strongly opposed the release of the names

based upon the foreign policy implications that such release would have. The matter was then reviewed by the Deputy Assistant Secretary for Caribbean Affairs, Richard H. Melton, whose views are set forth in his declaration, signed on March 17, 1989, and filed with this Court.

6. CDC was then instructed to review the documents to determine whether the information withheld from the documents met the criteria for classification. Based on a careful review of each of the documents and taking into account the factors set forth in the Melton Declaration, I have concluded that each of documents containing the names of the interviewees can be considered for classification because it constitutes information concerning foreign relations or foreign activities of the United States and information concerning a confidential source. I further have determined that release of the names reasonably could be expected to cause damage to the foreign relations and, therefore, the national security of the United States. Thus the names meet the criteria for classification under E.O. 12356.

Classification of the Names

7. Although these documents were not classified upon initial review, I have determined that they meet the criteria for classification. Therefore, the documents were classified under the procedures prescribed by E.O. 12356, Section 6.1(d) providing for classification of information after it has been requested under the FOIA. The classification was performed by myself, an official with Top Secret classification authority. After reviewing each document to ensure that it met the criteria for classification, I marked each document in accordance with the procedural requirements of E.O. 12356.

8. Section 1.3(a) of the Executive Order states that "[i]nformation shall be considered for classification if it concerns: . . . (5) foreign relations or foreign activities of the United States . . . [or] (9) a confidential source."

Section 1.3(b) states that information meeting these criteria "shall be classified when an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security." Section 6.1(e) defines "national security" as the "national defense or foreign relations of the United States."

9. Section 1.3(c) states that the unauthorized disclosure of a confidential foreign source is presumed to cause damage to the national security. "'Confidential source'" means any individual or organization that has provided, or that reasonably may be expected to provide, information to the United States on matters pertaining to the national security, with the expectation, express or implied, that the information or relationship, or both, be held in confidence." Section 6.1(f).

10. The documents in this case are classified "Confidential." Section 1.1(a)(3) states that "'confidential' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security." In this case, the interviews were conducted on the understanding that the information would be used only for monitoring the treatment of the returnees and that the interviewees would not be publicly identified. The returnees are individuals who provided information to the U.S. on matters pertaining to "national security" with the expectation that that relationship would be held in confidence and, thus, meet the definition of confidential source. Disclosure of the names is presumed to cause damage to the national security. However, in addition to this presumption, there are indentifiable bases for a reasonable belief that damage to our foreign relations could occur as a result of disclosure of the names of the interviewees. Many of the facts upon which I relied in making my classification determination are set forth in the Declaration of Richard Melton which is hereby incorporated by reference into this Declaration.

11. Release of the names of persons who gave the interviews would make other persons in similar circumstances reluctant to speak with Embassy officials. The United States' ability to conduct interviews such as these is important to a number of U.S. foreign policy interests. First, the U.S. concluded an international agreement with Haiti in which the Haitian government bound itself not to persecute any of the returnees for illegal departure. The U.S. has a strong foreign policy interest in assuring that other nations with whom we enter into agreements comply with the terms of those agreements. When the obligations relate to treatment of persons, the most reliable method of monitoring compliance is to speak to those affected by the obligations.

12. Second, monitoring of the treatment of persons who attempt to leave their country of origin is an important tool for the U.S. in its efforts to assure humanitarian treatment of migrants and refugees in all parts of the world. In this case, there was no finding of harassment by the Haitian government. However, this information could be relied upon as truthful only if obtained upon the assurance of confidentiality.

13. Third, this type of interview was and continues to be important to assure that the U.S. is able to carry out its own laws, such as section 207 and 208 of the Immigration and Nationality Act, relating to political asylum and refugee admission of persons who have been persecuted or have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. Our inability to preserve confidentiality of sources who provide information on human right conditions would jeopardize the government's ability to monitor human rights conditions under the Foreign Assistance Act of 1961, as amended.

14. Fourth, the credibility of the U.S. would be damaged by release of the names, impairing the government's ability to obtain information about conditions and events in foreign countries generally, and thereby inhib-

iting the government's ability to anticipate and evaluate accurately changes in the local political scene which may have international ramifications. The government's in ability to represent with any degree of credibility that it can and will keep confidences regarding contacts with persons seeking to leave their country of origin could also impair the effectiveness of U.S. political asylum and refugee programs, not only with respect to Haiti, but with respect to other countries as well.

15. If the names of the Haitians who were interviewed are released, local citizens in Haiti, and possibly in other countries, will become less likely to speak freely with Embassy officials, which will cause damage to our foreign relations in the manner described above. Therefore, the names of the returnees who were interviewed are currently and properly classified under E.O. 12356 1.3.(a)(5) and (a)(9).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of March, 1989.

/s/ Pratt Byrd
PRATT BYRD

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 86-2430-Civ-HASTINGS
87-2087-Civ-HASTINGS

MICHAEL D. RAY, PLAINTIFF

vs.

U. S. DEPT OF JUSTICE, ET AL., DEFENDANTS

Miami, Florida
April 12, 1989

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE DAVID W. DYER

APPEARANCES:

For the Plaintiff:

MICHAEL D. RAY and NEIL D. KOLNER, ESQ.

For the Defendant:

CAROLE JEANDHEUR and DEXTER LEE, AUSA, ESQ.

* * * *

[9] Exemption 6 is the personal privacy exemption pled before, as the Court noted in its decision, there is a balancing that must be done between the privacy of the individuals who provided the information and the needs of the individuals who have requested the information, and the need of the public at large to get such information.

We feel this balance does mean in favor of the personal privacy in part because of the possible retaliation against the individuals who provided the information, should their identities be released in light also of the fact that the information we don't believe at this point will aid the plaintiff's in the purposes for which they seek it.

The information is dated. The interviews are from 1982 and '83. The chances of being able to track down these individuals and find out whether their statements are accurate seems unlikely, also, since that time the Government of Haiti has been in a great deal of flux; the Duvoleyes have left the country. There have been several coupes; changes of Government; center unstable.

The information about conditions in 1983 is just not likely to be applicable to the situation in '86 or '89 when the plaintiff's requested that information.

* * * *

EDITOR'S NOTE:

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E.O. 12356 N/A
TAGS: HA, SHUM, SCOM, SHUM, SOCI
SUBJECT: HAITIAN RETURNEES

1. THE EMBASSY CONTINUES TO FIND THAT ITS RETURNEE FOLLOW-UP PROGRAM FOR HAITIANS RETURNED TO HAITI, EITHER FOLLOWING EXPULSION FROM THE UNITED STATES OF THOSE PICKET UP ON THE HIGH SEAS BY THE US COAST GUARD, IS UNKNOWN. THE RESULT IS THAT MANY HAITIANS IN THE US BELIEVE THAT THEY WOULD BE MISTREATED OR PERSECUTED SHOULD THEY RETURN TO HAITI. SUCH IS NOT THE CASE, AS THE DEPARTMENT KNOWS.

2. PUBLICITY ON THE EFFECTIVE RETURNEE FOLLOW-UP PROGRAM WOULD BE PARTICULARLY HELPFUL IN MIAMI AND NEW YORK SINCE MANY HAITIANS CURRENTLY IN DETENTION THERE DO NOT RETURN VOLUNTARILY TO HAITI FOR FEAR OF WHAT AWAITS THEM ON THEIR RETURN. WE UNDERSTAND THAT CERTAIN HAITIAN EXILE ORGANIZATIONS HAVE CONVINCED DETAINEES AT THE KROME DETENTION CENTER IN MIAMI, FOR EXAMPLE, THAT THEY WOULD BE PUT TO DEATH SHOULD THEY RETURN.

3. TO MEET THIS PROBLEM, THE EMBASSY PROPOSES THAT THE DEPARTMENT SEEK A SUITABLE OPPORTUNITY TO PRESENT THE FACTS TO THE TARGET AUDIENCES CONCERNED. FOR ITS PART, THE EMBASSY WILL PREPARE A FACT SHEET (SEPTEL) EXPLAINING HOW HAITIAN RETURNEES HAVE
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TREATED -- NO DEATHS, ONLY ONE ALLEGED CASE OF MISTREATMENT

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AMONG THE 271 HAITIAN INTERDICTEES INTERVIEWED IN FOLLOW-UP VISITS SINCE 1982 (26 PERCENT OF THE RETURNEE POPULATION).

4. OUR OBJECTIVE HERE IS TO PRESENT THE FACTS TO THE HAITIAN COMMUNITY IN THE US WITH A VIEW TOWARD FACILITATION THE DECISION TO RETURN BY HAITIANS WHO TRULY WANT TO RETURN TO THEIR FAMILIES HER BUT ARE DETERRED BY FALSE INFORMATION FOISTED ON THEM FOR POLITICAL REASONS.
MCMANAWAY

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UNCLAS SECTION 01 OF 02 PORT AU PRINCE 1252

E.O. 12356 N/A
TAGS:HA, SHUM, SCOM, SOCI
SUBJECT: FACT SHEET ON AMEMBASSY PORT AU PRINCE 'S MONITORING OF HAITIAN INTERDICTEES AND RETURNEES

REF: PAP 1014

1. SUMMARY: THE FOLLOWING IS A FACT SHEET TO BE USED IN PRESENTATIONS TO TARGETED U.S. AUDIENCES EXPLAINING HOW HAITIAN INTERDICTEES AND OTHER RETURNEES (DEPORTEES, EXCLUDEES, AND WITHDRAWALS OF APPLICATION) HAVE BEEN TREATED (SEE REFTEL). EMBASSY INTERVIEWS OF 398 HAITIAN INTERDICTEES AND RETURNEES HAVE REVEALED ONLY
ONE ALLEGED INCIDENT OF OFFICIAL HARASSMENT AMONG THE HAITIANS RETURNED TO HAITI BY THE U.S. COAST GUARD OR THE U.S. IMMIGRATION AND NATURALIZATION SERVICE. END SUMMARY.

2. AMEMBASSY PORT AU PRINCE K'S MONITORING OF HAITIAN INTERDICTEES
A. THE U.S. HAITI BILATERAL AGREEMENT ON SELECTIVE INTERDICTION:
THE SEPTEMBER 23, 1981 U.S. HAITI BILATERAL AGREEMENT ON SELECTIVE INTERDICTION ESTABLISHED A COOPERATIVE PROGRAM OF U.S. COAST GUA
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DEPARTMENT OF STATE A/CDC/MR
D
DATE ED BY T. Hearn DATE 5/28/02

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INTERDICTION AND RETURN TO HAITI OF HAITIAN MIGRANTS WHO ARE FOUND WITHOUT VALID TRAVEL DOCUMENTS AND WHO FAIL TO DEMONSTRATE TO U.S. IMMIGRATION OFFICERS A LEGITIMATE CLAIM FOR POLITICAL ASYLUM. THE COAST GUARD HAS INTERDICTED AND RETURNED 1162 HAITIANS SINCE THE AGREEMENT WAS SIGNED. THIS PROCESS OF SELECTIVE INTERDICTION REMAINS IN EFFECT AND HAS SUCCEEDED IN DRAMATICALLY REDU CING
THE VOLUME OF ILLEGAL HAITAIN ARRIVALS IN THE SOUTHEASTERN U.S. FROM 15,094 IN 1980 TO 380 IN 1983.

B. HAITIAN GOVERNMENT ASSURANKCE THAT INTERDICTEES WILL NOT BE PROSEC UTED:
THE GOH HAS GIVEN WRITTEN ASSURANCE IN THE INTERDICTION AGREEMENT THAT THE INTERDICTTES WILL NOT BE PROSECUTED FOR THEIR ILLEGAL DEPARTURE FROM HAITI, AN ACT WHICH IS IN VIOLATION OF HAITIAN LAW. ACCORDING TO THIS LAW, ALL DEPARTING HAITIANS ARE REQUIRED TO OBTAIN AN EXIT VISA FROM THE MINISTRY OF THE INTERIOR. THE GOH ALSO HAS A LAW PROHIBITING TRAFFICKING IN ALIENS WHICH CARRIES THE PENALTIES OF FINES UP TO $10,000 AND THREE YEARS IN PRISON. UNDER THE AGREEMENT, THE GOH PLEDGED TO PROSECUTE GNLE THE ORGANIZERS AND TRAFFICKERS OF BOAT PEOPLE. THE EMBASSY'S FOLLOW-UP PROGRAM IS DESIGNED TO VERIFY GOH COMPLIANCE WITH THE BILATERAL AGREEMENT.

C. THE FOLLOW-UP PROGRAM:
SINCE SEPTEMBER 1981, AN EMBOFF HAS MONITORED THE RETURN OF HAITIAN BOAT PEOPLE UNDER THE TERMS OF THE U.S. GOH BILATERAL AGREEMENT ON SELECTIVE INTERDICTION. AN EMBOFF INTERVIEWS THE INTERDI CTEES
ABOARD THE COAST GUARD CUTTER UPON THEIR ARRIVAL IN PORT AU PRINCE AND ACTS AS AN OBSERVER DURING THE INTERVIEWS CONDUCTED BY THE HAITIAN RED CROSS, FOREIGN MINISTRY, IMMIGRATION, AND POLICE
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OFFICIALS. THE FOLLOWING CHART DISPLAYS THE INFORMATION COLLECTED ON HAITIAN INTERDICTEES BETWEEN OCTOBER 1981 AND THE PRESENT DATE:

	1981	1982	1983	YTD1984	TOTAL
NUMBER OF BOATLOADS OF INTERDICTEES RETURED TO PORT AU PRINCE	2	6	21	7	36
NUMBER OF INTERDIC-TEES RETURNED	64	152	571	375	1162
NUMBER OF INTERDICTEES INTERVIWED IN FOLLO-					

UP TRIPS	95	102	73	271

AS IS SHOWN ABOVE, THE NUMBER OF INTERDICTIONS AND INTERDICTEES HAVE CLIMBED STEADILY SINCE 1982, NECESSITATING MORE FREQUENT FOLLOW-UP TRIPS INTO THE FIELD TO MAINTAIN A 25 PERCENT INTERVIEW RATE. EMBASSY OFFICERS HAVE VISITED ALL AREAS IN HAITI POSSESSING SIGNIFICANT RETURNEE POPULATIONS AT LEAST ONCE, INCLUDING THE REMOTE ISLANDS OF LA GOVAVE, LA TORTUE, AND CAYEMITE. THE 271 INTERDICTEES WHO HAVE BEEN INTERVIEWED IN FOLLOW-UP VISITS REPRESENT 23.3 PERCENT OF THE TOTAL INTERDICTEE POPULATION.

D. FOLLOW-UP TRIP RESULTS:
DURING THE COURSE OF THE INTERVIEW, THE OFFICER ASKS ABOUT THE INTERDICTEES'S AFAMILY, STATE OF HEALTH, EMPLOYMENT OPPORTUNITIES, AND PLANS FOR FUTURE TRAVEL TO THE UNITED STATES. THE QUESTION AS TO WHETHER THE INTERDICTEE HAS EXPERIENCED ANY FORM OF HARASSMENT FROM THE HAITIAN POLICE. MILITARY OR CIVILAIN MILITIA OFFICIALS IS WORKED CASUALLY INTO THE CONVERSATION. IN THE TWO AND ONE-HALF YEARS OF THE PROGRAM'S EXISTENCE, ONLY ONE INERDICTEE HAS MENTIONED A THREAT OF MISTREATMENT BY HAITIAN AUTHORITIES. HIS CLAIM WAS UNVERIFIABLE AS THERE WERE NO WITNESSES PRESENT.

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UNCLAS SECTION 02 OF 02 PORT AU PRINCE 1252

3. EMBASSY MONITORING OF OTHER HAITIAN RETURNEES:
SINCE NOVEMBER1981, THE EMBASSY HAS ALSO MONITORED
THE STATUS OF THE HAITIANS RETURNED TO UHAITI BY THE U.S.
IMMIGRATION SERVICE AS DEPORTEES, EXCLUDEES, OR WITHDRAWASL
OF APPLICATION. AS THE INS GENERAL COUNSEL SUGGESTED THAT TIME
PERMITTING, THE EMBASSY CONTACT THESE TYPES OF RETURNEES AS
WELL AS THE INERDICTEES, AN EMBOFF ZONDUCTS THE SAME TYPE OF
INTERVIEW AS DESCRIBED ABOVE AT THE TIME OF THE
RETURNEE'S ARRIVAL AT THE PORT AU PRINCE AIRPORT AND WITHIN
SIX MONTHS OF HISK RETURN TO HAITI. THE FOLLOWING CHART DISPLAYS
THE DATA COLLECTED ON HAITIANS WHO HAVE BEEN DEPORTED OR EXCLUDED
FROM THE U.S. AS WELL AS THOSE WHO WITHDREW THEIR APPLICATION FOR
ADMISSION AT THE U.S. PORT OF ENTRY:

	1981-1982	1983	YTD 1984	TOTAL
NUMBER OF RETURNEES MET AT AIRIORT	424	19	18	461
NUMBER OF OTHER RE-TURNEES IN-TERVIEWED IN FOLLOW-				

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UP TRIPS	88	36	3	127

THE 127 RETURNEES WHO HAVE BEEN INTERVIEWED REPRESENT 27.5 PERCENT

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OF THE TOTAL RETURNEE POPULATION. NONE OF THESE INTERVIEWED CLAIMED TO HAVE SUFFERED POLITICAL PERSECUTION AS A RESULT OF THEIR DEPARTURE.

4. ANALYSIS OF THE FOLLOW-UP TRII RESULTS:
INTERDICTEES AND RETURNEEES APPEAR TO REINTEGRATE INTO THEIR HOME COMMUNITIES FAIRLY QUICKLY AND RESUME THEIR LIVES WITHOUT INTERFERENCE FROM THE HAITIAN GOVERNMENT. LOCAL AUTHORITIES ARE NOT PROVIDED WITH LISTS OF NAMES OF INTERDICTEES AND RETURNEES AND THERE ARE NO REPORTS OF THEIR HAVING ATTEMPTED TO SEEK SUCH *INFORMATION. THE EMBASSY HAS NOT CONFRONTED ANY OFFICIAL OBSTACLES* IN SEEKING INTERDICTEES AND RETURNEES IN FOLLOW-UP TRIPS:
OUR INTERVIEWS HAVE BEEN CONDUCTED IN THE ABSENCE OF GOH OFFICIALS AND THE INFORMATION COLLECTED CONFIRMS THAT THE HAITIAN GOVERNMENT HAS COMPLIED WITH ITS ASSURANCES NOT TO PERSECUTE RETURNING HAITIANS.

5. ACTION REQUESTED: REQUEST DEPARTMENT PROVIDE INFORMATION IN WHATEVER FORMAT IS DEEMED DESIRABLE TO REACH TARGET AUDIENCES IN MAIMI, NEW YORK, AND WASHINGTON, D.C. TO MAKE THE POINT THAT HAITIANS RETURNED TO PORTK AU PRINCE BY THE U.S. COAST GUARD OR THE INS FACE NO REPRISALS OR BAD TREATMENT UPON THEIR RETURN. THE PURPOSE OF THIS INFORMATION EFFORT IS TO COUNTE CRITICISM OF
THE USG IN THIS REGARD AND TO ENHANCE THE INCENTIVES FOR GHAIT:ANS ILLEGALLY IN THE U.S. TO RETURN VOLUNTARILY TO HAITI.
MCMANAWAY

SUPREME COURT OF THE UNITED STATES

No. 90-747

UNITED STATES DEPARTMENT OF STATE, PETITIONER

v.

MICHAEL D. RAY, ET AL.

ORDER ALLOWING CERTIORARI
Filed March 4, 1991

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted limited to Question 1 presented by the petition.

March 4, 1991

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No. 90-747

Supreme Court, U.S.
FILED
APR 18 1991
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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF STATE, PETITIONER

v.

MICHAEL D. RAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

In this case under the Freedom of Information Act (FOIA), respondents seek to obtain names and other information that would identify Haitian citizens who were interviewed, on a confidential basis by State Department personnel in Haiti in the course of monitoring the Haitian Government's compliance with its agreement not to persecute persons returned to that country by the United States. The question presented is:

> Whether the names and other information identifying the individual Haitian citizens who consented to be interviewed by State Department personnel are protected against mandatory disclosure by FOIA Exemption 6, which applies to matters "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-747

UNITED STATES DEPARTMENT OF STATE, PETITIONER

v.

MICHAEL D. RAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 908 F.2d 1549. The orders of the district court (Pet. App. 25a-30a, 31a-33a) are reported at 725 F.Supp. 502 and 505.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1990, and a petition for rehearing was denied on October 12, 1990. Pet. App. 34a-35a. The petition for a writ of certiorari was filed on November 13, 1990, and was granted on March 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Freedom of Information Act, 5 U.S.C. 552, are set forth at Pet. App. 38a-39a.

STATEMENT

1. In Proclamation No. 4865 of September 29, 1981, President Reagan concluded that "the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States" is "a particularly difficult aspect" of a "serious national problem." 46 Fed. Reg. 48,107. To combat this rampant evasion of the Nation's immigration laws, the President directed the Coast Guard to interdict certain vessels carrying undocumented aliens and to return those vessels and passengers to their point of origin. Exec. Order No. 12,324 (46 Fed. Reg. 48,109 (1981)). Additionally, the Secretary of State was directed by the President to enter into "cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States." *Ibid.* The President specifically admonished that the interdiction program was to be implemented with "strict observance of our international obligations concerning those who genuinely flee persecution in their homeland." *Id.* at 48,110. The Executive Order thus provides, with respect to interdicted vessels, "that no person who is a refugee will be returned without his consent." *Id.* at 48,109.[1]

[1] See United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 268. The United States acceded to the Protocol in 1968. 19 U.S.T. 6223, T.I.A.S. No. 6577. Article 1.2 of the Protocol defines a "refugee" as a person who is out of his country due to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." 19 U.S.T. 6261.

The Protocol obligates the United States to comply with the substantive requirements of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. 19 U.S.T. 6225. As pertinent here, Article 33.1 of the Convention provides (19 U.S.T. 6276): "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." See *INS* v. *Stevic*, 467 U.S. 407, 417 (1984).

Haiti, an impoverished nation with a lengthy history of political repression,[2] has been a source of significant illegal immigration into the United States. On September 23, 1981, the State Department, acting pursuant to Exec. Order No. 12,324, therefore entered into an arrangement with Haiti for cooperative efforts in the high seas interdiction program. See Agreement on Migrants—Interdiction, Sept. 23, 1981, United States-Haiti, 33 U.S.T. 3559, T.I.A.S. No. 10241. As part of that agreement, the State Department obtained assurances from Haiti that inter-

[2] Haiti suffered for 29 years under the notorious "Papa Doc" and "Baby Doc" Duvalier dictatorships, followed by five years of military rule. Haiti's human rights record is documented in the State Department's annual *Country Reports of Human Rights Practices*, which are published as Joint Committee Prints by the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs. See *Reports* for 1985 (pp. 571-81), 1986 (pp. 533-40), 1987 (pp. 510-19), 1988 (pp. 598-607), 1989 (pp. 620-27), and 1990 (pp. 656-664). Recent developments in Haiti are more hopeful. On February 7, 1991, Haiti inaugurated Rev. Jean-Betrand Aristide, the first popularly elected President in Haiti's 187-year history.

dicted Haitians would not be persecuted by their government for illegal departure. *Ibid.* The State Department further advised Haiti that persons determined by the United States "to qualify for refugee status" would not be returned to Haiti. *Ibid.*

Beginning in 1981, the State Department monitored Haiti's compliance with its agreement not to persecute persons involuntarily returned to that country. Upon the return of interdicted vessels to Port-Au-Prince, U.S. Embassy officials obtained the names and addresses of returnees. Approximately six months afterwards, State Department personnel located in Haiti conducted interviews with a representative sample of the returnees. To obtain the most candid and reliable responses, the interviews "were conducted with the clear understanding that they would be held confidential." J.A. 56. The Haitians "were informed that the purpose of the * * * interviews was to monitor the well-being of the returnees." *Ibid.* These interviews confirmed that Haiti has not persecuted or mistreated its nationals for attempted unlawful immigration into the United States. J.A. 42-43.

2. Respondent Michael Ray, a Miami, Florida lawyer, brought this action under the Freedom of Information Act (FOIA), 5 U.S.C. 552, on his own behalf and on behalf of three Haitian nationals seeking political asylum in the United States. J.A. 14-27. Respondents previously had filed FOIA requests with the Department of State seeking "copies and listings of the reports and trips to Haiti" made by State Department personnel. J.A. 21. The State Department released 25 documents, but deleted from 17 of those documents the names and other information that would identify individual Haitians who had been interviewed following their return to Haiti. The

State Department withheld the information under FOIA Exemption 6 (Pet. App. 26a), which provides that the disclosure requirements of FOIA do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).[3]

The State Department filed a motion for summary judgment on the Exemption 6 claim, supported by the affidavit of John Eaves, the Acting Deputy Director of the Office of Mandatory Review of the State Department's Classification and Declassification center. J.A. 40. Mr. Eaves explained that the 17 redacted documents were reports from Haiti of confidential interviews by State Department personnel of Haitian nationals who had been involuntarily returned to Haiti following unsuccessful attempts to enter the United States without documentation. The interviews were conducted to determine whether the individuals had been mistreated by Haitian authorities upon their return. J.A. 42. Respondents alleged that they needed the information for use in their deportation proceedings, in order to assist them in showing that they would be subject to persecution if they were returned to Haiti. Pet. App. 3a-4a. Mr. Eaves explained, however, that the State Department had released the substance of the reports in their

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[3] The term "similar files" in Exemption 6 is not limited "to a narrow class of files containing only a discrete kind of personal information." *United States Department of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). Instead, it applies broadly to any "detailed Government records on an individual which can be identified as applying to that individual." *Ibid.* (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)). It is not disputed in this case that the Haitian interview reports constitute "similar files" within the meaning of Exemption 6.

entirety and that the names and other identifying information were withheld in order "to protect the privacy of Haitians who consented to interviews by Embassy officers" (J.A. 42-43):

> While no evidence of harassment or ill treatment of the returned Haitians was reported, those who were interviewed consented to the procedures with the understanding that their conversations with Embassy officers would be conducted under conditions of privacy and confidentiality. To disclose the identities of these individuals would not only betray their trust in our discretion, it would also subject them or their families to possible embarrassment in their social and community relationships. This would be a clearly unwarranted invasion of the privacy of the individuals concerned.

3. On March 3, 1989, the district court issued its order rejecting the State Department's effort to protect the identities of the Haitian interviewees under FOIA Exemption 6. Pet. App. 25a-30a. The district court noted that, in determining whether disclosure would result in a clearly unwarranted invasion of personal privacy, it was required to "employ a balancing test, weighing an individual's right of privacy against the public right to disclosure of government information." *Id.* at 28a. Treating "[t]he promise of confidentiality by the State [Department]" as "only one factor to be considered," the court found the privacy interests at stake in this case to be "de minimis and little more than speculation." *Id.* at 29a. On the other side of the balance, the court stated that "this country's immigration policy supports a finding that the public has a legitimate interest in the safe relocation of returned Haitians." *Ibid.* The court concluded that the balance "tilts" in favor of disclosure

of the names and other information identifying the individual Haitians who had consented to be interviewed, even though those interviews were conducted under the State Department's promise of confidentiality. *Ibid.* The court therefore ordered the State Department to release that information within 15 days, although it withheld entry of final judgment until after expiration of that period. *Ibid.*[4]

4. On March 17, 1989, the State Department moved for reconsideration,[5] arguing that the identities of the Haitian nationals are protected not only by FOIA Exemption 6, but also by Exemptions 1, 7(C) and 7(D), 5 U.S.C. 552(b)(1), (7)(C) and (7)(D). Those exemptions provide that FOIA does not apply (i) to matters that are properly classified pursuant to Executive Order of the President or (ii) to law enforcement information the release of which could reasonably be expected either to constitute an

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[4] Respondents also sought to obtain an alleged list of 600 individuals who had been returned to Haiti and had not been persecuted. The State Department and Immigration and Naturalization Service concluded, however, that no such list existed. Both courts below found the agencies' searches for the alleged list to have been adequate. Pet. App. 16a-20a, 26a-27a. In addition, respondents requested the district court to certify a class of all black Haitian citizens in exclusion and deportation proceedings who would present asylum claims and to enjoin those proceedings until six months after respondents obtained the information they sought under the FOIA. The district court, affirmed by the court of appeals, refused to certify a class and dismissed respondents' request for injunctive relief. *Id.* at 5a, 15a-16a, 21a-24a, 29a n.3, 36a-37a. Those issues are not involved here.

[5] Although the district court had withheld entry of final judgment (Pet. App. 29a), the motion was styled a Motion to Alter or Amend Judgment and was filed pursuant to Fed. R. Civ. P. 59(e).

unwarranted invasion of personal privacy or to disclose the identity of a confidential source.

The motion for reconsideration was supported by the declaration of Richard H. Melton, the Deputy Assistant Secretary of State for Inter-American Affairs. J.A. 53. Mr. Melton reconfirmed that the interviews "were conducted with the clear understanding that they would be held confidential" (J.A. 56, 57):

> If Haitians interviewed had been aware that their names and statements could be made public and might be used in political asylum proceedings, either on behalf of or against fellow Haitians, the interviewees might have been far less candid in nature. Had the U.S. government not been able to assure confidentiality of the names of interviewees, the United States would have been severely handicapped in its ability to obtain the information necessary to assess the success of its agreement with Haiti and the interdiction program.

Mr. Melton further explained that, if the "essential trust" that the United States would "protect the identity of sources of information" were breached,

> [o]ther Haitians or third country nationals on whom the United States relies for candid and frank assessments of internal conditions would be reluctant to believe in a U.S. promise of confidentiality, and thus no longer be willing to provide the U.S. information it needs to effectively conduct law enforcement programs or to attain foreign policy objectives.

J.A. 56-57. For these reasons, he stated (J.A. 57) that the documents were being reviewed for classification pursuant to Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982).

On March 27, 1989, the State Department informed the court in a supplemental memorandum that, following the review instituted by Deputy Assistant Secretary Melton, the identities of the Haitian nationals had been classified. That memorandum was accompanied by the declaration of Pratt Byrd, the Acting Deputy Director of the Office of Mandatory Review in the State Department's Classification and Declassification Center, who explained that the interview reports are proper subjects of classification because they constitute information concerning "foreign relations or foreign activities of the United States" and involve a "confidential source." Accordingly, the names had been classified because their release "reasonably could be expected to cause damage to the national security" of the United States. J.A. 61, 62 (quoting Exec. Order No. 12,356, 47 Fed. Reg. 14,876 (1982).

The district court chose not to address the merits of the State Department's submission. Instead, the court held that the State Department had waived its FOIA Exemption 1 and Exemption 7 claims by failing to raise them until after the court had ordered disclosure. Pet. App. 31a-33a.

5. The court of appeals affirmed. In addressing the Exemption 6 issue, the court thought it "important to candidly acknowledge that it appears that [respondents] seek the redacted information so that they can contact directly the Haitians who were interviewed by American officials and question them about how they are treated by the Haitian government since attempting to flee to the United States." Pet. App. 7a. "In light of that fact," the court found it "difficult to characterize this invasion of the Haitian returnees' privacy to be no more than de minimis,"

as the district court had done. *Ibid.* The court also noted that "the returnees were promised confidentiality before they talked with U.S. government officials," a factor that, while it may not mandate the withholding of the names of the persons who were interviewed, "adds weight to the privacy interests at stake." *Id.* at 7a-8a. For these reasons, the court of appeals "beg[a]n the balancing process" by "acknowledging that there are significant privacy interests at stake here." *Id.* at 8a.

Nevertheless, while regarding it as a "close question," the court held that disclosure was required because the significant privacy interests affected were outweighed by a legitimate public interest in disclosure. The court agreed with the State Department that respondents' desire to use the information in resisting deportation did not justify disclosure because the goal of FOIA is "to open agency action to the light of public scrutiny," not to further "private purposes." Pet. App. 8a-9a (quoting *Department of the Air Force* v. *Rose*, 425 U.S. 352, 361 (1976)). The court determined, however, that respondents had a proper interest in obtaining "the information in order to learn whether the United States government is adequately monitoring Haiti's compliance with its obligation not to persecute returnees and to learn whether our government is honest to the public about Haiti's treatment of returnees." Pet. App. 9a. The court found it significant that respondents "dispute the view expressed publicly by some government officials that Haiti is adhering to its promise not to punish returnees, and they seek information that will assist them in testing the accuracy of that information." *Ibid.*

The court acknowledged that "the disclosure of the Haitians' names and addresses, in and of itself, will not tell plaintiffs anything about Haiti's treatment of its returnees or the U.S. government's honesty about the matter." *Ibid.* But the court found it sufficient that release of the names "will give [respondents] a means to obtain 'public interest' information in that they can then locate the Haitian returnees and inquire about how they were treated after they were returned to Haiti." *Ibid.* The court viewed this case as different in this respect from *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), in which this Court upheld the government's refusal to disclose the inherently personal information in criminal "rap sheets," because respondents in this case "seek information about individuals that will help them scrutinize what our government is doing and saying regarding Haitians who unsuccessfully attempt to flee to this country." Pet. App. 12a.

The court of appeals also affirmed the district court's ruling that the State Department had waived its right to rely on Exemptions 1, 7(C) and 7(D) by failing to raise those arguments prior to the district court's rejection of its Exemption 6 claim. Pet. App. 13a-15a.

On October 12, 1990, the court of appeals denied the State Department's petition for rehearing and suggestion for rehearing en banc. Pet. App. 34a-35a. On March 4, 1991, this Court granted the State Department's petition for a writ of certiorari, limited to the question presented in the petition under FOIA Exemption 6.

SUMMARY OF ARGUMENT

I. The central purpose of the Freedom of Information Act is not simply to provide the fullest possible disclosure of documents in the government's possession. Rather, the central purpose of FOIA is to provide the "fullest *responsible* disclosure" of government documents. See *EPA* v. *Mink*, 410 U.S. 73, 80 (1973) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (emphasis added)). In providing for "responsible disclosure," Congress intended the courts to achieve an accommodation that "balances, and protects all interests" that the FOIA exemptions recognize. *Ibid.*

The balance struck by Congress in FOIA Exemption 6 is that information constituting a "clearly unwarranted invasion of personal privacy" is not to be disclosed. 5 U.S.C. 552(b)(6). In determining whether a disclosure constitutes a "clearly unwarranted invasion of personal privacy," Congress intended that both the public need for responsible disclosure and the personal need for privacy would be protected by the agencies and by the courts.

Here, the Department of State properly balanced these interests by providing the requested Haitian interview reports while redacting the names (and limited other information) that would identify the particular individuals who were interviewed. The redaction of the names and other identifying information was "unquestionably appropriate because the names of the particular" persons interviewed "were irrelevant to the inquiry into the way" the State Department was administering its responsibilities. *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). "[D]isclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." *Id.* at 765.

This Court emphasized in *Reporters Committee* that, while there is a public interest in the disclosure of information that "directly" reveals the government's conduct of its affairs, the names and identities of private citizens found in government records "reveals little or nothing about an agency's own conduct." 489 U.S. at 773. Because disclosure of private information in the government's files reveals nothing directly about the conduct of government, "it should come as no surprise" that this Court has consistently rebuffed all efforts to secure such information. *Id.* at 774 & n.21.

II. The privacy interest in protecting the names of the Haitian interviewees from disclosure in this case arises in an unusually sensitive setting. The State Department reports identify these individuals as persons who suffer extreme poverty, who have a desire to leave their country, who have engaged in unlawful immigration activity in the past, and who are willing to talk about their relations with their own government with diplomatic representatives of the United States. The interview reports contain details about the individuals, their employment, their education, and their domestic situations. All of this information was obtained under pledges of confidentiality from representatives of the United States. The privacy interests at issue in this case are certainly no less substantial than those considered by the Court in its prior FOIA decisions, particularly in view of respondents' admitted intent to track down these persons and interrogate them further. The invasion of personal privacy in this case is so severe, and the public need for disclosure so conjectural and attenuated, that the Act's objective of "responsible disclo-

sure" would be defeated by providing the information that respondents seek.

ARGUMENT

I. DISCLOSURE OF THE HAITIANS' IDENTITIES WOULD NOT ADVANCE THE PURPOSES OF THE FREEDOM OF INFORMATION ACT

A. To Accommodate The "Fullest Responsible Disclosure" Of Government Records, The FOIA Permits The Redaction Of Personal Identification Information

The Freedom of Information Act could accurately be described as a general mandate for disclosure that is modified by a list of specific and detailed exemptions. 5 U.S.C. 552(a) and (b). While this bare description of the statute is literally correct, it represents a "cramped" view of the careful balancing of interests that Congress sought to accomplish in the Act. Cf. *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. at 776. The guiding principle for the proper application of the detailed exemptions from disclosure afforded by the Act is that the courts are to accommodate the "fullest responsible disclosure" that "balances, and protects all interests." *EPA* v. *Mink*, 410 U.S. at 80 (quoting S. Rep. No. 813, *supra*, at 3). See also *Department of the Air Force* v. *Rose*, 425 U.S. at 361-362.

The specific exemption at issue in this case addresses the need to safeguard personal privacy from unwarranted disclosure of personal information located in government files. FOIA Exemption 6 provides that the disclosure requirement of the Act "does not apply" to "personnel and medical files and similar files the disclosure of which would constitute a clearly

unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6); see note 3, *supra*.[6] Congress perceived that the evident harm caused by the disclosure of personal information could well exceed the public benefit, if any, of such disclosure. In an important passage from the Senate Report that preceded enactment of FOIA, which has been cited by this Court in each of its FOIA decisions addressing privacy issues, the following guidance was provided:

> At the same time a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.
>
> It is not an easy task to balance the opposing interests, but it is not an impossible one either. *It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated.* Success lies in providing a workable formula which encompasses, balances, and protects all

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[6] Similarly, Exemption 7(C) removes from the disclosure requirements of the Act "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). In granting certiorari in this case, the Court declined review of the holding of the courts below that reliance on Exemption 7(C) was waived by the State Department in this case.

> interests, yet places emphasis on the fullest responsible disclosure.

S. Rep. No. 813, *supra*, at 3 (emphasis added). Congress thus deemed protection of the "equally important rights of privacy" to be fully compatible with the Act's disclosure requirement. While personal privacy is fully protected, the agencies and the courts may still accomplish "the fullest responsible disclosure." *Ibid.*

The House Report on the Act further explains how the policies of privacy and responsible disclosure can be reconciled:

> The limitation of a "clearly unwarranted invasion of personal privacy" provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual. *The exemption is also intended to cover detailed Government records on an individual which can be identified as applying to that individual* and *not* the facts concerning the award of a pension or benefit or *the compilation of unidentified statistical information from personal records.*

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (emphasis added). The "workable formula" (*EPA* v. *Mink*, 410 U.S. at 80) that Congress intended to apply in providing for the fullest responsible disclosure of government records is thus achieved by permitting the release of the information compiled by the government, so long as anonymity is maintained. The statute specifically provides in this regard that protected information may be redacted, while the balance of the document is produced. 5 U.S.C. 552(b).

See *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. at 766 (the provisions in FOIA allowing redaction reflect "a congressional understanding that disclosure of records containing personal details about private citizens can infringe significant privacy interests"); *Department of the Air Force* v. *Rose*, 425 U.S. at 374.

This Court's decisions construing Exemption 6 comport with these expressions of congressional intent. In *Department of the Air Force* v. *Rose*, legal scholars researching the disciplinary procedures at the military academies for a law review article sought the case summaries of the honors and ethics hearings with the names and other identifying personal information redacted. The government argued that the case summaries should be withheld in their entirety. The Court held, however, that "nonconfidential matter" contained in personnel records or similar files "was not to be insulated from disclosure." 425 U.S. at 372. The Court emphasized that disclosure, " 'with personal references and other identifying information deleted,' respected the confidentiality interests embodied in Exemption 6." *Id.* at 380.

Most recently, the Court denied, as an unwarranted invasion of privacy under Exemption 7(C), the disclosure requested by journalists of criminal "rap sheets" for specific, named individuals. *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, *supra*. The Court initially noted that the language employed to protect privacy under Exemption 7(C) differs from that found in Exemption 6 (489 U.S. at 756; see note 6, *supra*) and that "the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law-enforcement pur-

poses is somewhat broader than the standard applicable to personnel, medical, and similar files." *Ibid.* While the standard differs "somewhat," the analytic framework for the evaluation of privacy invasion under both Exemption 6 and Exemption 7(C) was the same. 489 U.S. at 768-769.[7]

As explained in *Reporters Committee*, the personal privacy interest that had been "doubly stressed" by the Court in *Department of the Air Force* v. *Rose* was anonymity: "We praised the [Air Force] Academy's tradition of protecting personal privacy through the redaction of names from the case summaries * * * and approved the Court of Appeals' rule permitting the District Court to delete 'other identifying information' in order to safeguard this privacy interest." 489 U.S. at 769. In *Reporters Committee*, the Court emphasized that the refusal to provide information on identifiable private individuals created no conflict with the FOIA's overall disclosure policies. "[T]he FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." *Id.* at 774.[8]

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[7] See also *FLRA* v. *United States Department of the Treasury*, 884 F.2d 1446, 1451-1452 (D.C. Cir. 1989) (disclosure of employee names and addresses to union violates privacy interests protected by Exemption 6), cert. denied, 110 S.Ct. 863 (1990); *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d 873, 874-875 (D.C. Cir. 1989) (disclosure of status as retirement-eligible federal employee violates privacy interests protected by Exemption 6), cert. denied, 110 S.Ct. 1805 (1990).

[8] The Court gave the following example: " 'The public has a need to know * * * the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public.' Both public relief and income tax assessments—like law enforcement—are proper subjects of public concern. But just as the *identity* of the individuals given public relief or involved in tax matters *is irrelevant* to the public's understanding of the Government's operation, so too is the identity of the individuals who are the subjects of rap sheets irrelevant to the public's understanding." 489 U.S. at 766 n.18 (emphasis added) (quoting from H.R. Rep. No. 1497, *supra*, at 8).

The FOIA "create[s] a right of access to 'official information,' " so that the people may be "informed about 'what their government is up to.' " *Ibid.* (quotin *EPA* v. *Mink*, 410 U.S. at 80, 105 (Douglas, J., dissenting)). While there is a public interest in the disclosure of information that "directly" reveals the government's conduct of its affairs, "[t]hat purpose * * * is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct." 489 U.S. at 773. The deletion of personal identification information from government reports is thus "unquestionably appropriate because the names of the particular" persons involved are "irrelevant to the inquiry into the way the" government administers its responsibilities. *Ibid.* As this Court held in *Reporters Committee*, "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." 489 U.S. at 765.

B. The Disclosure Of Personal Identities To Provide Freedom Of Information Act Requesters A Means Of Obtaining Information Outside Of Government Files Is Contrary To Exemption 6

By releasing the redacted interview reports, the State Department provided respondents with the substantive information of significance concerning the manner in which the government is conducting its affairs. These documents reveal the procedures employed by the State Department to monitor Haiti's compliance with its undertakings concerning the treatment of interdicted Haitian nationals. They further reveal the specific information obtained by the State Department in conducting the interviews, and they reveal whether the interviews confirm or call into question the Department's views concerning Haitian compliance. The State Department's deletion of the names and other identifying information from the text of the reports directly follows the course mapped out by this Court in *Department of the Air Force* v. *Rose*. It was "unquestionably appropriate" for the State Department to delete the names of the individual Haitians from the interview summaries released to respondents because the names were "irrelevant" to an understanding of the manner in which the government was supervising and administering the interdiction program. See *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. at 773. Here, as in *Rose* and in *Reporters Committee*, "leaving the identifying material in the summaries would therefore have been a 'clearly unwarranted' invasion of individual privacy." *Id.* at 773-774. See also *KTVY* v. *United States*, 919 F.2d 1465, 1469 (10th Cir. 1990); *Halloran* v. *Veterans Administration*, 874 F.2d 315, 324 (5th Cir. 1989); *Miller* v. *Bell*, 661 F.2d 623, 630-631 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982).

The court of appeals frankly acknowledged that "the disclosure of the Haitians' names and addresses, in and of itself, will not tell [respondents] anything about Haiti's treatment of its returnees or the U.S. government's honesty about the matter." Pet. App. 9a. Even though there was thus no discernible public interest in the disclosure of the personal information "in and of itself," the court of appeals nevertheless ordered disclosure under the rationale that "the identifying information will give [respondents] a means to obtain 'public interest' information in that they can then locate the Haitian returnees and inquire about how they were treated after they were returned to Haiti." *Ibid.*

The reasoning adopted by the court of appeals cannot be reconciled with this Court's decisions nor with the evident congressional purpose in adopting Exemption 6. The "derivative use" theory created by the court of appeals—which justifies the disclosure of private information on the rationale that doing so would permit the requester to check the accuracy of the government's records at their source—would stand this Court's decisions on their head, creating an exception that swallows the rule of *Rose* and *Reporters Committee*.

1. The "derivative use" theory invites wholesale circumvention of the important protection afforded to personal privacy under the FOIA. In *Rose*, for example, if this Court had applied the reasoning adopted by the court of appeals in this case, and if the requesters had represented that they planned to contact the current and former cadets named in the case summaries in order to ask them about the

truth and accuracy of the summaries and the fairness and effectiveness of the Academy's disciplinary program, the Court would have required the Air Force to disclose that identifying information. Similarly, in *Reporters Committee*, the requesters might have obtained the requested rap sheets simply by expressing their intention to use them to investigate whether the FBI maintained accurate rap sheets or appropriately pursued all allegations of criminal activity. Under the rationale of the court of appeals in this case, a requester could obtain access to a broad range of otherwise confidential personal information maintained in the files of the government's health, welfare, selective service and veterans programs—information that is precisely of the type that the legislative history of FOIA identifies as deserving of protection under Exemption 6 (see *Department of the Air Force* v. *Rose*, 425 U.S. at 375-376). All that such a requester would be required to do is frame his request in terms of a desire to contact the individuals involved and interview them as part of an investigation into the accuracy of the government's records and the fairness or effectiveness of the administration of those governmental programs. That result would conflict sharply with the expressed congressional intent that "these files should not be opened to the public." S. Rep. No. 813, *supra*, at 9.

The Second Circuit has very recently rejected the proposed "derivative use" theory precisely because it would swallow entirely the privacy protections afforded by Exemption 6. In *Hopkins* v. *HUD*, No. 90-9269 (Apr. 1, 1991), a union had requested information from payroll records on HUD-assisted housing construction projects for the purpose of de-

termining compliance with the "prevailing wage" provisions of the Davis-Bacon Act, 40 U.S.C. 276a *et seq.* The payroll records were disclosed by HUD after the agency had "deleted all employee names, addresses and social security numbers." Slip op. 2. The court of appeals upheld the agency's redaction of this personal information (*id.* at 15 (Oakes, C.J.)):

> [D]isclosure of this information would serve the public interest only insofar as [it] would allow the union to contact individual employees, who may then dispute the accuracy of the data reflected in the records, and so reveal violations of the prevailing wage laws that HUD, through proper diligence should have detected. Were we to compel disclosure of personal information with so attenuated a relationship to governmental activity, however, we would open the door to disclosure of virtually all personal information, thereby eviscerating the FOIA privacy exemptions.

2. The "derivative use" theory is flatly inconsistent with the holding in *Reporters Committee* that disclosure is not required if the requested information *itself* "would tell us nothing *directly*" about the conduct of the government. 489 U.S. at 774 (emphasis added). See *Hopkins* v. *HUD*, slip op. 15; *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 1805 (1990). The Court held in *Reporters Committee* that the deletion of personal identification information is "unquestionably appropriate" precisely because such information is "irrelevant to the inquiry into the way" the government administers its responsibilities. 489 U.S. at 773. See also *id.* at 766 n.18.

This important limiting principle is rooted in the FOIA's text and purposes. The FOIA regulates the public availability of "agency records" (5 U.S.C. 552(a)(4)(B)) that constitute the "official information" that is already in the possession of the agency and that document or govern the conduct of its official business. 489 U.S. at 772 & n.20. The FOIA is not intended to facilitate access to information outside a federal agency, even where it has some relation to that agency's work. *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150-154 (1980). The objective of the FOIA is to provide the public a right to know "governmental information." *Department of the Air Force* v. *Rose*, 425 U.S. at 372 (quoting H.R. Rep. No. 1497, *supra*, at 11). And, while the names and the identifying information respondents' seek are contained in agency records, even the court below recognized that such information "in and of itself" would not tell respondents anything about the government. Pet. App. 9a. Respondents' desire to use that information to obtain *nongovernmental* information from private sources in Haiti cannot justify an invasion of the important privacy interests that are protected by Exemption 6.[9] "No statement was made in Congress that the

[9] In *SafeCard Services, Inc.* v. *SEC*, 926 F.2d 1197 (D.C. Cir. 1991), the court rejected a FOIA request for the names and addresses of potential witnesses or litigants in SEC stock manipulation investigations: "The public interest in disclosure is not just less substantial, it is insubstantial. * * * [T]he type of information sought is simply not very probative of an agency's behavior or performance." See also *Reed* v. *NLRB*, No. 90-5147 (D.C. Cir. Mar. 15, 1991), where the court held that Exemption 6 authorized the N.L.R.B. to withhold the names and addresses of employees eligible to vote in a union election. The court of appeals held that *Reporters Committee*

Act was designed for a broader purpose such as making the government's collection of data available to anyone who has any socially useful purpose for it." *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. at 772 n.20 (quoting from Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 Harv. C.R.-C.L. L. Rev. 596, 608 (1976)).

3. The court of appeals' reliance on respondents' stated plan to contact the Haitian nationals for the purpose of developing information for subsequent use in other proceedings conflicts with the express statutory policy of uniform treatment of all requesters. The FOIA provides that, upon "any request," agencies are to make their records "available to any person." 5 U.S.C. 552(a)(3). No discrimination among requesters is authorized.

FOIA was designed to make it unnecessary for the government to decide in each specific instance whose request was worthy and whose was not. Before FOIA was enacted, the Administrative Procedure Act had provided that information was available only to "persons properly and directly concerned" with that information. 5 U.S.C. 1002 (1964); see *EPA* v. *Mink*, 410 U.S. at 79. FOIA removed any consideration of the personal needs of the requester from the determination of whether disclosure is required. As this Court held in *Reporters Committee*, "whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made." 489 U.S. at 771. Rather, "any member of

controlled, since the data sought by the requester revealed nothing directly about agency conduct. Slip op. 5.

the public is entitled to the same disclosure." *Id.* at 775.[10]

An approach that turns upon a proposed use for the government records, rather than on the intrinsic informational value of the records, would introduce unworkable speculation and complexity into the application of Exemption 6. In this case, for example, an accurate weighing of the asserted public interest in respondents' proposed endeavor would require an assessment of the likelihood that some number of the Haitian nationals would consent to be interviewed by respondents and, further, would amend their representations, and that respondents would be able to show that State Department officials were aware, or should have been aware, of this potential for recantation. The federal personnel who must evaluate the enormous volume of FOIA requests in the first instance cannot reasonably be expected to make the elaborate and sophisticated judgments inherent in the "derivative use" analysis required by the decision of the court below. There is, moreover, no principled basis for thrusting the agencies and the courts into the analytical morass of discerning the competency, resources, and motives of individual requesters. Congress did not intend that the "equally important" protection of privacy interests under Exemption 6 should depend upon on such an improbable calculus.

Nor has this Court sanctioned such an analysis in its prior decisions. Instead, the Court has concluded that the disclosure of the names of persons that are

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[10] See also *Durns* v. *Bureau of Prisons*, 804 F.2d 701, 706 (D.C. Cir. 1986) ("Congress granted the scholar and the scoundrel equal rights of access [under the FOIA] to agency records."), vacated and remanded on other grounds, 486 U.S. 1029 (1988).

contained in documents located in the government's files reveals nothing about the conduct of government. Because the disclosure of such personal information does not advance the objectives of the FOIA, it "should come as no surprise" that this Court has never ordered the release of such information. 489 U.S. at 774-775 & n.21.

II. EVEN IF THERE WERE SOME COGNIZABLE "PUBLIC INTEREST" IN THE IDENTITIES OF THE HAITIANS WHO WERE INTERVIEWED, THE SEVERE INTRUSION ON PERSONAL PRIVACY THAT WOULD RESULT FROM DISCLOSURE WOULD BE CLEARLY UNWARRANTED

Because there is no valid public interest recognized by FOIA in the disclosure sought by respondents in this case, inquiry into the *degree* of the privacy invasion that would occur should be unnecessary. Any invasion of privacy in these circumstances would be clearly unwarranted: "We need not linger over the balance: something, even a modest privacy interest, outweighs nothing every time." *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d at 879.

The disclosure of a person's identity in a specific factual context within a government document is itself a significant invasion of personal privacy that courts have proscribed under Exemption 6. The fact that the person who requests the documents has a desire to make some further use of that personal information does not suffice to require disclosure—if anything, it heightens the invasion of privacy. Thus, for example, the disclosure of a bare list of names and addresses maintained in a file possessed by the federal government will not be required, even though it would subject those listed to no more than "an unwanted

barrage of mailings and personal solicitations" of a commercial or charitable nature. See *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d at 876 (quoting *Minnis* v. *Department of Agriculture*, 737 F.2d 784, 787 (9th Cir. 1984)). This principle applies even where the nature of the information provided about the listed individuals is apparently innocuous or benign. *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d at 874 (status as retirement-eligible federal employee); *FLRA* v. *Department of the Treasury*, 884 F.2d 1446, 1452 (D.C. Cir. 1989) (membership in employment bargaining unit), cert. denied, 110 S.Ct. 863, 864 (1990); *Ripskis* v. *HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (favorable employee evaluations); *Minnis* v. *Department of Agriculture*, 737 F.2d at 785 (users of federal park land potentially interested in lodging accommodations); *AFGE, Local 1923* v. *HHS*, 712 F.2d 931, 932 (4th Cir. 1983) (membership in employment bargaining unit); *Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133, 136-137 (3d Cir. 1974) (recipients of licenses to produce wine for home consumption potentially interested in winemaking equipment). These decisions flow from the bedrock concept of privacy that underlies Exemption 6—"the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). See also *Reporters Committee*, 489 U.S. at 752; *Heights Community Congress* v. *Veterans Administration*, 732 F.2d 526, 529 (6th Cir.), cert. denied, 469 U.S. 1034 (1984).

The impact of the disclosure sought by respondents in this case is vastly more severe than the privacy interests protected in the ordinary name-and-address

case. A far greater intrusion than a barrage of junk mail, or an unwanted telephone solicitation or a salesman's visit, is at stake. The privacy interest in protecting the names of the Haitian interviewees arises in an unusually sensitive setting, for disclosure of the individual Haitians' names would immediately and publicly identify them as persons who cooperated with the United States government on a confidential basis by furnishing information concerning the Haitian government, and the treatment that Haiti has offered its own citizens, on a matter of international concern. As the Eaves Declaration points out (J.A. 43), public disclosure of this information "would * * * subject them or their families to possible embarrassment in their social and community relationships." This guarded diplomatic understatement does not obscure the basic point that cooperation with United States officials by foreigners is not always greeted with indifference by the foreigner's government or countrymen. See *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 597 n.2 (1982) (certain Iranian leaders "have been strongly criticized in the press for their alleged ties to the United States," and "[a]ny individual in Iran * * * having American connections is looked upon with mistrust"). This is particularly so when the cooperation concerns the conduct of that foreign government in its relations with its own citizens.

Beyond the underlying fact of their cooperation with the United States in describing domestic Haitian affairs, the interview reports that were released to respondents typically contain detailed personal information about the individuals who were interviewed. The reports describe these persons' marital status, family characteristics, employment status or history,

living conditions, the circumstances of past unlawful attempts to enter the United States, and the receipt of Red Cross aid upon return.[11] Disclosure of such information quite plainly constitutes a "clearly unwarranted" invasion of privacy under this Court's cases. See *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. at 762-775; *Department of the Air Force* v. *Rose*, 425 U.S. at 375-377; *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 600-601 (1982). In no FOIA case of which we are aware has such personal information been ordered disclosed.

The purpose for which respondents seek this information adds further to the assault upon the privacy values protected by the Act. Respondents seek these names and addresses so that they can go to Haiti, track down the interviewed Haitian citizens and "check what happened" by interrogating them further (Mar. 1, 1989, Tr. 38), thereby subjecting them to contentious, involuntary involvement in respondents' disputes with the State Department. This objective, which the court below expressly approved (Pet. App. 10a), represents a profound misuse of the FOIA and a distortion of its purposes. FOIA is not meant to be used as a tool to

[11] For example, one of the State Department reports describes the interviewee as "a 33-year-old with a wife and four children * * * [;] * * * by profession a tailor [who] did not have the funds to buy materials to set up shop again." Documents lodged with the Court, page 4. Another describes an interviewee as "an unemployed 21-year-old living with his mother and five younger siblings in a one-room shack in Delmas. * * * He never went to school and has no marketable skills." *Id.* at 5. All of the reports identify the interviewees, by definition, as people who engaged in attempted unlawful entry into the United States.

extract private identities from government records for the purpose of obtaining the "involuntary personal involvement" of those persons in the respondents' investigation of government conduct, or anything else that the requesters might want to do to or with the individuals. *Heights Community Congress* v. *Veterans Administration*, 732 F.2d 526, 530 (6th Cir. 1984). To the contrary, this Court has admonished that the disclosure of the personal identities of persons reflected in government files is "irrelevant to the public's understanding of the Government's operation" and is not authorized under FOIA. *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. at 766 n.18.

There is another important factor that further aggravates the extraordinary invasion of personal privacy sought by respondents in this case. The Haitians were interviewed under a promise of confidentiality made by representatives of the government of the United States. Such assurances of confidentiality quite obviously heighten an individual's expectation of privacy. The release of information provided under such a pledge unquestionably "involves a greater invasion of privacy than release of information provided without such a pledge." *Washington Post Co.* v. *Department of Health & Human Services*, 690 F.2d 252, 263 (D.C. Cir. 1982). For this reason, "a government pledge of confidentiality, made in good faith and consistently honored" (*ibid.*), gives significant weight to the privacy interest to be protected under Exemption 6.

We do not contend that the mere fact that the government obtained the information under a pledge of confidentialty invariably controls the question of disclosure under Exemption 6. For example, in *Wash-*

ington Post and *Robles* v. *EPA*, 484 F.2d 843, 846 (4th Cir. 1973)—which were cited by the court of appeals for the proposition that a promise of confidentiality is *not* controlling (Pet. App. 7a-8a)—the pledges of confidentiality were both limited and uneven, and there was correspondingly less reason to believe that the pledges had led to a heightened expectation of privacy. By contrast, in this case the interviews "were conducted with the clear understanding that they would be held confidential," and the uncontradicted record establishes that this understanding was important in causing the Haitian nationals to confide in U.S. officials. J.A. 56, 62-63.

The circumstances under which the interviews were conduc'ed in this case provide a highly reasonable context for the government to have offered confidentiality.[12] The *Reporters Committee* decision strongly supports the conclusion that expectations of privacy induced by objectively reasonable assurances of confidentiality should be respected. The Court stressed in *Reporters Committee* that an important aspect of the privacy protected by the FOIA is "the

[12] Because the documents were properly classified, if the Exemption afforded to such documents had been found to be timely raised, the disclosure of this information would have been barred by Exemption 1 of the FOIA (5 U.S.C. 552 (b)(1)) as well as by Exemption 6. Exemption 1 prohibits disclosure of documents that have been properly classified pursuant to criteria established under an Executive Order "in the interest of national defense or foreign policy." 5 U.S.C. 552(b)(1)(A). After this case was commenced in the district court, the identities of the persons interviewed were classified pursuant to Exec. Order No. 12,356 as information concerning the "foreign relations or foreign activities of the United States" that involved a "confidential source." See 47 Fed. Reg. 14,876 (1982); pages 6-9, *supra*.

individual's control of information concerning his or her person," because "information may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public.'" 489 U.S. at 763-764 (quoting *Webster's Third New International Dictionary* 1804 (1976)). When an individual voluntarily furnishes personal information to the government in reliance on a promise that it will be "restricted" to government use and not be "freely available to the public," a due regard for the individual's right not to have given that information in the first place should be given great weight. Private individuals, speaking on terms of confidence with representatives of our Department of State, would reasonably anticipate that "[g]reat nations, like great men, should keep their word." *Heckler* v. *Mathews*, 465 U.S. 728, 748 (1984).[13]

The privacy interests in this case fall within the core of the protection afforded by Exemption 6. The State Department has made a responsible disclosure of the information that relates to the conduct of government. Indeed, all of the records sought were

[13] The State Department has broad responsibilities for monitoring human rights violations in other nations. See page 2, *supra*. Those efforts play an instrumental role in the enforcement of our own laws as well, such as those governing refugee and asylum applications. See 8 U.S.C. 1157, 1158. The credibility of the United States would be damaged by release of the names of persons who cooperated under pledges of confidentiality, with the result of "impairing the government's ability to obtain information about conditions and events in foreign countries generally, and * * * inhibiting the government's ability to anticipate and evaluate accurately changes in the local political scene which may have international ramifications." J.A. 63-64.

provided after the names and identifying information were redacted. Disclosure of the names of the Haitians who were interviewed under assurances of confidentiality would be irrelevant to the understanding of our government's operations and would plainly invade the privacy of the Haitian returnees. It should not be required.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

UNITED STATES DEPARTMENT OF STATE, *Petitioner,*

v.

MICHAEL D. RAY, Individually and as attorney for certain Haitian political asylum applicants, IVES AUDATE, JEAN HEVIL LOISEAU, and YVON NICOLAS, on behalf of themselves and all others similarly situated, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Haiti, a nation with a lengthy history of political repression, entered into a program with the United States whereby (a) the United States interdicted vessels carrying Haitian aliens and returned those aliens to Haiti, and (b) the United States maintains it monitored Haiti's promise not to persecute the returnees. State Department officials claim to have interviewed close to 600 returnees in Haiti and stated publicly to the press and in connection with political asylum proceedings that returnees have not suffered persecution in Haiti. Respondents seek to obtain under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the names and addresses of the supposedly interviewed returnees to further public interests in assuring the safe relocation of the returnees, in ascertaining whether the United States is monitoring properly Haiti's obligation not to persecute the returnees, in determining whether the United States has been truthful regarding stated lack of persecution, and in providing fair and consistent political asylum proceedings in this country. The question presented is:

> Whether Petitioner, the State Department, properly refused to disclose the names and addresses of the allegedly interviewed Haitian returnees under FOIA Exemption 6 (5 U.S.C. § 552(b)(6)), which protects only "a clearly unwarranted invasion of personal privacy," when the State Department has not raised any significant privacy interests to be protected and when the public interests in disclosure are substantial.

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No. 90-747

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

UNITED STATES DEPARTMENT OF STATE, *Petitioner,*

v.

MICHAEL D. RAY, Individually and as attorney for certain Haitian political asylum applicants, IVES AUDATE, JEAN HEVIL LOISEAU, and YVON NICOLAS, on behalf of themselves and all others similarly situated, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

I. Background

The fate of Haitian applicants who seek political asylum in the United States is largely dependent upon advisory opinions provided by the State Department's Bureau of Human Rights and Humanitarian Affairs ("BHRHA") to the Immigration and Naturalization Service ("INS") and the Executive Office for Immigration Review ("EOIR").

The State Department claims that its advisory opinions are based, *inter alia*, on its "analysis of country conditions and other relevant factors." R. 97-Ex. 1. A typical State Department advisory opinion from March, 1989 for an asylum applicant from Haiti states:

> We have no evidence that hundreds of Haitian emigrants who are returned to their homeland each year are persecuted by the government of Haiti, and we are unimpressed by unsubstantiated assertions to the contrary. While individual Haitian emigrants may have problems for individual reasons, no pattern of persecution exists. Pl. Ex. 1; R. 121, p. 16, R. 97-Ex. 1.

An earlier advisory opinion from July, 1987 recommended against political asylum on a different ground:

> The applicant cited, as the basis for a fear of persecution, conditions which pertained under the government of former President[for-life] Jean Claude ["Baby Doc"] Duvalier. With the resignation of that government on February 7, 1986, and the disbanding by official decree of the "Volunteers for National Security," known as the "Ton Ton Macoutes," the grounds on which the applicant based the alleged fear of persecution no longer exist. The present government has demonstrated its commitment to treat all Haitians in accordance with the law. R. 55-Ex. B.

In contradiction to statements made in its advisory opinions, the State Department now admits that during all relevant time periods Haiti has endured "a lengthy history of political repression" (Pet.Br. 3) in that Haiti has "suffered for 29 years under the notorious 'Papa Doc' and 'Baby Doc' Duvalier dictatorships, followed by five years of military rule" (Pet.Br. 3 n.2). The State Department's current observations comport with

reports by many observers from the *New York Times* and CBS *60 Minutes* to the United Nations.[1]

The law is plain that political asylum applicants "shall be given an opportunity to inspect, explain and rebut" the advisory opinions. Title 8 C.F.R. § 208.10(b) (1990). Furthermore, INS deportation procedures, governed by 8 U.S.C. § 1252(b), provide that aliens have the right to present evidence and to receive a reasonable opportunity to examine the evidence against them. However, "there are no discovery procedures provided by INS regulations" and "FOIA is essentially the only procedure which aliens can use to obtain from the INS information relevant to their cases." *Mayock v. INS*, 714 F.Supp. 1558, 1560 (N.D. Cal. 1989) (9th Cir. appeal pending on other grounds). *See also* authorities cited in *Mayock, supra*, 714 F.Supp. at 1560 n.1.

It is against this backdrop that Respondents first requested under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the names of individuals returned to Haiti ("returnees") as part of an interdiction program, who the State Department claims, based upon alleged interviews, have not been persecuted since their return.[2] After patiently waiting without results for

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[1] *See, e.g.*, "Is Duvalier Really Gone?," Vol. XX, 60 Minutes, (No. 7, Nov. 1, 1987), and more recently, Vol. 2 HAITI Insight, 1 (No. 6, Nov./Dec. 1990) ("Haunting the electors' memories is the experience of November 1987, when scores of would-be voters were slaughtered as they approached the polls, and the elections were cancelled by the military government in favor of fraudulent elections seven weeks later. In the months leading up to November 29, 1987, two presidential candidates and hundreds of ordinary Haitians were killed, and the electoral council's offices were burned to the ground . . . . Almost 700 monitors representing the United Nations and the Organization of American States . . . will be monitoring the elections" in attempts to avert violence).

[2] Respondents sought the names to rebut the State Department advisory opinions. The State Department's attorney conceded that the "information is dated. . .[thus,] information about conditions in 1983 is just not likely to be applicable to the situation in '86 or '89 when the [respondents] requested that information." J.A. 66.

However as recently as April 1991, the State Department continues to rely on these interviews to conclude that Haitians fleeing Haiti do not face persecution

the State Department to comply with this request, Respondents eventually filed this lawsuit to force the agency to comply with its statutorily mandated obligations. J.A. 1. Both the District Court (Pet.App. 29a and 33a, 725 F.Supp. 502 and 505) and the Eleventh Circuit (Pet.App. 24a, 908 F.2d 1549) ordered the State Department to provide Respondents with the names of the returnees.

II. The FOIA Requests

The FOIA requests at issue emanate from statements made by United States officials that the returnees have not been persecuted. In February 1984, the State Department sent telegrams to various agencies, including the INS, seeking to publicize to "target audiences" that the agency "knows" that Haitians "would [not] be mistreated or persecuted should they return to Haiti." J.A. 67. The State Department's target audiences were "the Haitian community in the US . . . who truly want to return to their families [in Haiti] but are deterred by false information foisted on them for political reasons." J.A. 68.

About ten months later, a banner headline story in *The Miami Herald* reported that the INS had "sent a team of investigators

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if returned to Haiti. *See e.g.:* Appendix attached hereto at 1a, for a report entitled "SITUATION IN HAITI" from the State Department, attached to advisory opinion letters during 1991. While this information is not in the record before this Court, Respondents hereby request that the Court take Judicial Notice of these materials. Certified copies of these documents from the Executive Office for Immigration Review have been lodged with the Court. *See: e.g. Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 742 n.4 (1976).

to Haiti" in order to find out why Haitians were fleeing to the United States in reported record numbers.[3] J.A. 32-33. One State Department official speaking to *The Miami Herald* with guaranteed anonymity stated that "[t]he word is out that it is worth a try [to come to the United States] . . . . If you're caught by the Coast Guard, you're treated well and you're not prosecuted by the Haitian government when you're returned." J.A. 34.

In February, 1985, Respondent Ray filed a FOIA request with the INS for all written INS interview reports concerning persecution, or lack thereof, suffered by the returnees. J.A. 21, ¶ 34.[4]

Apparently following up on the February, 1984 State Department telegrams seeking publicity (J.A. 67-68), the Miami INS District Director and the Commissioner of the INS attempted to convey the State Department message, that returnees face neither persecution nor mistreatment, by speaking with the Editorial Board of the *Miami News*. The ensuing editor's column stated that the Director and the Commissioner "made all the proper statements to shore up their argument that Haitians being sent back by U.S. authorities simply are allowed to blend into the countryside without so much as a wrist-slap for their efforts to flee to the United States." J.A. 28. Moreover, "[t]o stress how much he believes that, [the Miami INS District Director] even offered to provide names of 600 Haitians who have been sent back so that doubters can go to Haiti and speak to the people directly." *Ibid.*

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[3] According to *The Miami Herald* story:

> The Coast Guard interceptions of Haitians at sea are way up: In 1982 they caught 152 Haitians. In 1983, it was 651. This year [1984], through Dec. 3, a total of 3,706 - with more than a third of them since November. And that's not including at least 400 Haitians captured on the way to Florida or upon arrival since Dec. 3. J.A. 34.

[4] Respondents Audate, Nicolas and Louiseau submitted FOIA requests similar to Mr. Ray's in 1987. J.A. 22-23, ¶¶ 41-44.

Respondent Ray, in March 1985, took the Miami INS District Director up on his offer and filed a FOIA request for a comprehensive list of the 600 Haitians. J.A. 19, ¶ 20.

III. Agency Response And Resulting Litigation

Rather than provide the records, which the INS claimed it could not find, the INS responded to the request for 600 names by maintaining that the INS District Director "has stated that he was misquoted by the *Miami News*." J.A. 19, ¶ 21. In response to the FOIA request about the written INS interview reports on Haitian returnees, the INS stated that Mr. Ray should submit his request to the State Department in Washington D.C. J.A. 21-22, ¶ 36. Mr. Ray submitted his request to the State Department on June 12, 1985. J.A. 22, ¶ 39. The State Department asserted on July 30, 1985 that it would "make every effort to provide [Mr. Ray] with the requested information in as timely a manner as possible." R. 1-Ex. I.

Despite the July 30, 1985 assurances that the State Department would provide the information "in as timely manner as possible," no records were released. R. 9. Accordingly, Respondents filed suit under FOIA against the INS and the State Department in November, 1986. R. 1. All defendants filed a motion to dismiss in January 1987 to which they attached the State Department's *Country Reports on Human Rights Practices for 1985*, as evidence in support of their allegation that the "number of Haitian returnees referred to (600) [by the Miami INS District Director in the *Miami News* editorial] that have not suffered persecution is confirmed by U.S. Embassy interviews of 582 returnees to Haiti." R. 10-5.[5]

[5]The passage relied on states:

Follow-up trips to the Haitian countryside by the Creole-speaking returnee officer of the U.S. Embassy continue to demonstrate . . . that the Government is honoring its commitment not to harass or persecute Haitians who have illegally left the country and then been returned. In the first 9 months of 1985, 582 returnees were interviewed and no one alleged persecution or intimidation

In March, 1987, nearly two years after Mr. Ray's first FOIA request, the State Department reported that it could not locate "documents that are responsive to your request." The State Department then directed Mr. Ray back to the INS by stating that the "material which may be responsive to your request may be contained in the record systems of the Immigration and Naturalization Service. If you wish to pursue your inquiry, you should write to [that agency]." J.A. 20, ¶ 28, R. 36-Ex. I.

Just one month after the State Department reported that no records could be found, the State Department informed Mr. Ray that his FOIA request had been "reopened" and the agency "is presently formulating a response." R. 24-2. Then, about two months later, the State Department advised Mr. Ray that the agency finally had initiated searches of two additional records systems including "the Central Foreign Policy Records [the principal record system of the Department of State] and the Bureau of Inter-American Affairs." R. 44-Ex. A.

On July 3, 1987, nearly 25 months after Mr. Ray first requested the information from the State Department regarding the interviews of the returnees, Mr. Ray received 25 documents on this subject. However, 17 of these documents contained redactions ranging in size from one line to nearly one page. The State Department had redacted the names and addresses of the returnees -- the very heart of the information which Mr. Ray requested. R. 44-Ex. A.

IV. The District Court Decision

In September, 1987, Respondents filed a motion in the District Court for an order requiring the State Department to release the unredacted interview documents. R. 44. The State Department opposed the motion and filed a supplemental motion for summary judgment based on FOIA Exemption 6. 5

by the Haitian government. U.S. Department of State, 99th Cong., 2d Sess. at 579 (Jt. Comm. Print 1986). R. 10-Ex. at 579.

U.S.C. § 552(b)(6). The State Department relied on the declaration of John Eaves in an effort to show a clearly unwarranted invasion of personal privacy. J.A. 40-47. Mr. Eaves did not document factually any true invasions of privacy, and only referred to speculative "possible embarrassment." J.A. 43, ¶ 8. Furthermore, Mr. Eaves did not point to specific promises of confidentiality supposedly made to the returnees and referred only to an informal "understanding." J.A. 42-43, ¶ 8.[6]

In ruling on the motions, the District Court understood that "[w]here a FOIA request triggers a claim of exemption under the Act, the burden is on the agency to demonstrate the basis for nondisclosure." 725 F.Supp. at 504. The Court further recognized that:

> There is a presumption, under the FOIA, that documents held by a government agency are subject to disclosure. An agency cannot withhold material based on conclusory allegations of possible harm; it must show specific detailed proof that disclosure would defeat, rather than further the purposes of the FOIA. In determining whether the disclosure constitutes a "clearly unwarranted invasion of personal privacy, the Court must "employ a balancing test, weighing an individual's right to privacy against the public right to disclosure of government information."
>
> The degree of invasion of privacy considers the potential harm to the individual from disclosure of the information. The critical aspect is that an invasion be actual rather than just theoretical; it must be more than a mere possibility. *Id.* (Citations and footnote omitted.)

[6]Furthermore, the State Department admits that the names were obtained from interdicted vessels which the United States returned to Haiti. Pet.Br. 4. According to the Haitian Migrant Interdiction Operation ("HMIO") Guidelines, it is the practice of the Immigration and Naturalization Service to provide the names and addresses of the interdictees to U.S. Embassy representatives in Haiti "for disposition to the Haitian authorities". *See:* attached Appendix at 5a. Although these are not in the record before this Court the HMIO Guidelines were obtained from another Freedom of Information Act lawsuit. Respondents request this Court to take Judicial Notice of these materials as Certified copies of the trial exhibit list and of the Guidelines have been lodged with this Court. *See: e.g. Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 742 n.4 (1976).

After carefully reviewing the evidence in balancing any invasion of privacy against the public's right to disclosure, the District Court found that "[a]ny invasion of privacy from the mere act of disclosure of names and addresses would be de minimis and little more than speculation" and "this county's immigration policy supports a finding that the public has a legitimate interest in the safe relocation of returned Haitians." *Id.* at 505. The Court further found that the alleged "promise of confidentiality by the State Department is only one factor to be considered and, in this case, is not determinative of the outcome." *Id.* The Court concluded that by weighing the privacy interests against the public interests, "the balance tilts in favor of disclosure of the names because any intrusion into the privacy of the Haitian nationals would be minimal." *Id.*

As late as March, 1989, and after the District Court's judgment ordering disclosure of the names of the returnees, the State Department for the first time sought by motion to invoke FOIA Exemptions 1 and 7. R. 17.[7] The District Court ruled that these exemptions had been waived. 725 F.Supp. at 505. The Court found:

> [R]ather than exhibit due diligence the government has been neglectful in this matter by failing to raise these exemptions at the outset of this litigation. Consequently, the government has waived entitlement to those claims by invoking these belated exemptions after this Court's order requiring disclosure of the redacted information .... The government has only attempted to "play cat and mouse by

[7]The State Department filed the declarations of Richard Melton (J.A. 53-58) and Pratt Byrd (J.A. 59-64) in an effort to support newly claimed Exemptions 1 and 7. Neither of these declarations added anything to Mr. Eaves declaration on the issue of invasion of privacy.

withholding its most powerful canon until after the district court has decided this case and then springing it on surprised opponents and the judge." *Id.* at 505-506. (Citations omitted).

V. The Eleventh Circuit Decision

The Eleventh Circuit "affirm[ed] the district court's judgment in all respects." 908 F.2d at 1553. In reaching this holding, the Court employed the following analysis:

> Because FOIA is a "broad disclosure statute which evidences a 'strong public policy in favor of public access to information in the possession of federal agencies,'" the disclosure requirements of FOIA must be construed broadly and the exceptions narrowly. Documents are presumed to be subject to disclosure; when the government seeks to invoke an exemption, it bears the burden of proving that the exemption applies.
>
> In determining whether Exemption 6 applies we apply a balancing test, "weighing an individual's right to protection of privacy against the public's right to disclosure of government information." *Id.* at 1554. (Citations omitted).

The Eleventh Circuit "agree[d] with the district court that 'the balance tilts in favor of disclosure,'" even though the alleged invasion of privacy was considered to be more than *de minimis*, and even in light of the alleged promise of confidentiality. *Id.* [8]

Under this Court's reasoning in *United States Dep't of Justice v. Reporters Committee*, 489 U.S. 749, 103 L.Ed. 2d 774, 109 S.Ct. 1468 (1989), and *Department of the Air Force v. Rose*, 425

[8]The issue of the alleged promise of confidentiality was considered "a factor that adds weight to the privacy interests at stake here, but is not a factor that compels us to prohibit disclosure in this case." 908 F.2d at 1554. (Citations omitted).

U.S. 352, 48 L.Ed. 2d 11, 96 S.Ct. 1592 (1976), the Eleventh Circuit found an overriding and great public interest in disclosure of the returnees' names:

> [P]laintiffs . . . seek the information in order to learn whether our government is honest to the public about Haiti's treatment of returnees. They dispute the view expressed publicly by some government officials that Haiti is adhering to its promise not to punish returnees, and they seek information that will assist them in testing the accuracy of that information. *We consider these to be matters of great public interest significant enough to outweigh the privacy interests of the Haitian returnees.*
>
> *The government concedes that there exists "a legitimate public interest in the safe relocation of Haitians."* Initial Brief for the Government Agencies at 41 . . . . [T]he identifying information will give the plaintiffs a means to obtain "public interest" information in that they can then locate the Haitian returnees and inquire about how they were treated after they were returned to Haiti . . . . [T]hat factor . . . convinces us that *the information sought here is imbued with a significant public interest because it is a means for the public to see what its government is up to regarding the relocation of Haitians and what it is telling the public on this matter.* *Id.* at 1555. (Emphasis added).

The Eleventh Circuit noted that its "holding here is not inconsistent with *Reporters Committee*." *Id.* at 1556. The Court reasoned that:

> Nothing in *Reporters Committee* precludes the possibility that a FOIA request about a private individual may involve legitimate public interests; that case only explains that in the typical case where an individual seeks information about another individual, legitimate FOIA purposes are not involved. We consider this to be an atypical case. The plaintiffs herein seek information about individuals that will help them to scrutinize what our government is

doing and saying regarding Haitians who unsuccessfully attempt to flee to this country. This is an important public interest - the kind which Congress had in mind in framing FOIA. *Id.*[9]

The Eleventh Circuit also affirmed the District Court's ruling that Exemptions 1 and 7 were waived by the State Department. The Court found "it difficult to believe that the redacted information implicates compelling national security concerns in light of the government's failure *for almost two full years* to bring these concerns to the attention of the court or the plaintiffs." *Id.* at 1557. (Emphasis in original).[10]

SUMMARY OF ARGUMENT

The central purpose of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, is "the general philosophy of full agency disclosure." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) ("S. Rep. No. 813"). Indeed, the section of the FOIA Senate Report entitled "Purpose of Bill" quotes the following language from James Madison:

> Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both. S. Rep. No. 813 at 2-3.

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[9]The Eleventh Circuit, 908 F.2d at 1556, also distinguished *Federal Labor Relations Auth. v. U.S. Dep't of The Treas., Financial Management Serv.*, 884 F.2d 1446 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 863 (1990), and *National Ass'n of Retired Federal Employees v. Horner* ["*NARFE*"], 879 F.2d 873 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 1805 (1990), as cases that did not involve strong public interests in the requested information.

[10]This Court denied certiorari review on the issue of the waiver of these exemptions.

In keeping with the philosophy of broad disclosure, the government bears the burden under FOIA of justifying any decisions to withhold requested information. 5 U.S.C. § 552(a)(4)(B).

FOIA Exemption 6 (5 U.S.C. § 552(b)(6)), the statutory provision at issue, protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The use of the words "clearly unwarranted" was a "considered and significant determination." *Dep't of Air Force v. Rose*, 425 U.S. 352, 378 n.16, 48 L.Ed.2d 11, 96 S.Ct. 1952 (1976). These words "tilt the balance" of privacy and public interest factors under Exemption 6 "in favor of disclosure." *Washington Post Co. v. U.S. Dep't of Health and Human Services*,, 690 F.2d 252, 261 (D.C. Cir. 1982). (Citation omitted). Thus, "under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act" (*id.*) and "Exemption 6 [is] directed at threats to privacy interests more palpable than mere possibilities" (*Rose*, *supra*, 425 U.S. at 380 n.19).

Exemption 6 balancing first requires an inquiry into whether a substantial invasion of personal privacy is implicated by a FOIA request, and then only if such an invasion is implicated, the next step is to evaluate the public interests that may be served by disclosure of the requested information. "If no significant privacy interest is implicated," the inquiry ends and "FOIA demands disclosure." *National Ass'n of Retired Federal Employees v. Horner ["NARFE"]*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 1805 (1990), *citing Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 106 L.Ed. 2d 112, 109 S.Ct. 2841, 2850-53 (1989).

The District Court's decision, affirmed by the Eleventh Circuit, properly found that any privacy concerns of the returnees were outweighed by the great public interests in disclosure of the returnees' identities. The only evidence presented by the State Department on the issue of privacy is a

conclusory declaration which states that disclosure of the returnees' names would "subject them or their families to *possible* embarrassment in their social and community relationships." J.A. 43. (Emphasis added). Otherwise, the State Department claims that the returnees' names should not be disclosed because of alleged promises of confidentiality. The evidentiary record does not support these alleged promises, as not one of the 40 pages of interview reports refers to such promises. State Department Lodging 1-40. Furthermore, "to allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate." *Washington Post Co., supra*, 690 F.2d at 263. Not surprisingly, the courts frequently order disclosure resulting in personal identification in a variety of circumstances when the privacy interests under Exemption 6 are outweighed by the public interests in the information requested. *See, e.g., Cochran v. United States*, 770 F.2d 949, 956 n.9 (11th Cir. 1985); *Arieff v. Dep't of Navy*, 712 F.2d 1462 (D.C. Cir. 1983) (Scalia, J.); *Kurzon v. Dep't of Health & Human Services*, 649 F.2d 65 (1st Cir. 1981).

On the other side of the Exemption 6 balancing equation, the District Court and the Eleventh Circuit found on the uncontroverted facts the following substantial public interests supporting disclosure of the returnees' names: (a) the ability to guarantee the safe relocation of Haitians, (b) the opportunity to question whether the United States is monitoring properly Haiti's compliance with its obligations not to persecute returnees, and (c) a mechanism to determine whether United States officials were accurate in stating that the returnees have not been persecuted. 725 F.Supp. at 505; 908 F.2d at 1555. There also is a public interest in fair and consistent political asylum proceedings in the United States. The Eleventh Circuit noted that even the State Department admitted the "legitimate public interest in the safe relocation of Haitians." 908 F.2d at 1555. All of these public interests are heightened by the fact that the State Department admits that Haiti has "a lengthy history of political repression" (Pet.Br. 3) in that "Haiti suffered for 29 years under the notorious 'Papa Doc' and 'Baby Doc' Duvalier

dictatorships, followed by five years of military rule" (Pet.Br. 3 n.2), and by the fact that the record shows evidence of persecution in Haiti (J.A. 28, 29, 36 and 69).

With the law and the facts plainly against it, the State Department's entire case boils down to its "derivative use" argument. The State Department argues that information never can be disclosed under Exemption 6 when the "derivative use" for the information is "to check the accuracy of the government's records at their source." Pet.Br. 21. The State Department's argument inappropriately asks the Court completely to abandon traditional Exemption 6 balancing as intended by Congress and as enforced by this and other courts. Yet, the State Department fails to provide a plausible explanation as to *why* this Court should turn FOIA on its head by abandoning traditional Exemption 6 balancing. This failure is highlighted by the fact that the congressionally mandated balancing approach fully takes into account all interests, even in the "derivative use" scenario. If significant privacy interests outweigh public disclosure interests in the "derivative use" context under traditional Exemption 6 balancing, withholding is proper. If, on the other hand, in the atypical case, as this Court recognized in *United States Dep't of Justice v. Reporters Committee*, 489 U.S. 749, 773, 103 L.Ed.2d 774, 109 S.Ct. 1468 (1989), information concerning individuals "sheds light" on government conduct, disclosure may be appropriate under traditional Exemption 6 balancing. In this case, the identities of the returnees will help shed light on the conduct of the government with respect to the interdiction program and persecution in Haiti. The alleged privacy interests of the returnees are far outweighed by the significant public interests in disclosure.

The judgment of the District Court, affirmed by the Eleventh Circuit, was not clearly erroneous. The judgment of the Eleventh Circuit, therefore, should be affirmed.

ARGUMENT

I. The Purpose Of FOIA

This Court on numerous occasions has enunciated the basic philosophy of broad disclosure under FOIA, as summarized in *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 107 L.Ed.2d 462, 471, 110 S.Ct. 471, (1989), *reh. denied,* 110 S.Ct. 884 (1990):

> This Court repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA. "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling hands." The Act's "basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." (Citations omitted).[11]

In keeping with the philosophy of broad disclosure, the agencies bear the burden of justifying their decisions to withhold requested information. 5 U.S.C. § 552(a)(4)(B). Indeed, the pertinent Senate Report reads:

> Placing the burden of proof upon the agency puts the task of justifying withholding on the only party able to explain it. The private party can hardly be asked to prove that an agency has improperly withheld public information because he will not know the reasons for the agency action. S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965) ("S.Rep. No. 813").[12]

The State Department, citing S. Rep. No. 813, attempts to rewrite FOIA and reduce the scope of access to information by arguing that "the central purpose of FOIA is to provide the fullest *responsible* disclosure of government documents." Pet.Br. 12, 14. (Emphasis added). That Senate Report, however, plainly emphasizes that "*[i]t is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure* unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. It is important and necessary that the present void be filled." S. Rep. No. 813 at 3. (Emphasis added).[13] Only the last sentence in this section of the bill references the word "responsible" -- the word seized on by the State Department. Thus, the State Department's emphasis on "responsible" - rather than "fullest" - disclosure distorts the true intention of Congress as evidenced by the folowing quote from the Senate Report's "Purpose of Bill" quoting from James Madison:

> Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves

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[11] *See also Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 106 L.Ed.2d 112, 123-124, 109 S.Ct. 2841 (1989); *Dep't of Justice v. Reporters Committee*, 489 U.S. 749, 754-55, 103 L.Ed.2d 774, 784, 109 S.Ct. 1468 (1989); *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-362, 48 L.Ed.2d 11, 96 S.Ct. 1592 (1976); *EPA v. Mink*, 410 U.S. 73, 79-80, 35 L.Ed.2d 119, 93 S.Ct. 827 (1973).

[12] *See also John Doe Agency, supra*, 493 U.S. 146, 107 L.Ed.2d at 471 ("There are, to be sure, specific exemptions from disclosure set forth in the Act. 'But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of The Act.' Accordingly, these exemptions 'must be narrowly construed.' Furthermore, 'the burden is on the agency to sustain its action'") (citations omitted); *Exxon Corp. v. FTC*, 663 F.2d 120, 127 (D.C. Cir. 1980) ("In Freedom of Information Act cases, . . . the agency claiming an exemption from the duty to disclose information has the burden of proof and the district court should apply that burden with the knowledge that the plaintiff is at a distinctive disadvantage in attempting to test the claims alleged by the agency").

[13] *See also Arieff, supra,* 712 F.2d at 1468 (J. Scalia) ("Providing information 'material for monitoring the Government's activities' is the 'core purpose' of the FOIA").

with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both. S.Rep. No. 813 at 2-3.

II. The Government's Heavy Burden Under Exemption 6

Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). At the House and Senate committee hearings on the bill,[14] representatives of various government agencies urged that the words "clearly unwarranted," or at least the word "clearly", be deleted from the bill so that all invasions of privacy could be prevented.[15] The government objected to its "heavy burden" under the clearly unwarranted invasion of personal privacy standard. *Rose*, *supra*, 425 U.S. at 378 n.16. Congress, however, refused to delete this language it considered critical in limiting the scope of Exemption 6. S. Rep. No. 813 at 9; H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 11 (1966) ("H.R. Rep. No. 1497"). By retaining the words despite these repeated agency requests, Congress rejected an opportunity to guarantee blanket protection for all potential privacy invasions. The use of words "clearly unwarranted", therefore, was "a considered and significant determination." *Rose*, *supra*, 425 U.S. at 378 n. 16.[16]

The mandate of Exemption 6 that disclosure be "clearly unwarranted" instructs the courts to "tilt the balance" of privacy and disclosure interests "in favor of disclosure." *Washington Post Co. v. U.S. Dep't of Health & Human Services*, 690 F.2d 252, 261, (D.C. Cir. 1982). (Citation omitted).[17] Thus, "under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in The Act." *Id.*[18] Not surprisingly then, "[t]he legislative history is clear that Exemption 6 [is] directed at threats to privacy interests more palpable than mere possibilities" (*Rose*, *supra*, 425 U.S. at 380 n.19), and "Exemption 6 does not protect against disclosure every incidental invasion of privacy" (*id.* at 382).

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[14] *See, e.g.*, Hearings on H.R. 5012, H.R. 5013, H.R. 5014, H.R. 5015, H.R. 5016, H.R. 5017, H.R. 5018, H.R. 5019, H.R. 5020, H.R. 5021, H.R. 5237, H.R. 5406, H.R. 5520, H.R. 5583, H.R. 6172, H.R. 6739, H.R. 7010, H.R. 7161 Before a Subcommittee of the House Committee on Govt. Operations, 89th Cong., 1st Sess. (1965); Hearings on S. 1160, S. 1336, S. 1758, and S. 1879 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965); Hearings on S. 1666 and S. 1663 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. (1963).

[15] *See, e.g.*, testimony of Edwin Rains, Assistant General Counsel, Treasury Department, in Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 36 (1965) ("1965 Senate Hearings"); testimony of Fred. B. Smith, Acting General Counsel, Treasury Department, in Hearings Before a Subcommittee of the Committee on Government Operations of the House of Representatives on H.R. 5012, 89th Cong., 1st Sess. 56 (1965) ("1965 House Hearings"); testimony of Clark R. Mollenhoff, Vice Chairman, Sigma Delta Chi Committee for Advancement of Freedom of Information, 1965 House Hearings at 151; testimony of William Feldesman, NLRB Solicitor, 1965 Senate Hearings at 491 & 1965 House Hearings at 257.

[16] The State Department focuses on the following language in H.R. Rep. No. 1497 at 11: "The exemption is also intended to cover detailed government records on an individual . . . ." However, this section of the House Report simply addresses which records constitute "personnel and medical files and similar files" which are *eligible* for, not entitled to, Exemption 6 consideration.

[17] *See also Ditlow v. Schultz*, 517 F.2d 166, 169 (D.C. Cir. 1975); *Robles v. EPA*, 484 F.2d 843, 846 (4th Cir. 1973); *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971); *Southern Utah Wilderness Alliance, Inc. v. Hodel*, 680 F.Supp. 37, 39 (D.D.C. 1988); *Citizens for Environmental Quality v. Dep't of Agriculture*, 602 F.Supp. 534, 538 (D.D.C. 1984).

[18] *See also Kurzon v. Dep't of Health & Human Services*, 649 F.2d 65, 67 (1st Cir. 1981) ("By restricting the reach of exemption 6 to cases where the invasion of privacy caused by disclosure is not only unwarranted but *clearly* so, Congress has erected an imposing barrier to nondisclosure under this exemption"; withholding is a "rare case" when "the calculus unequivocally supports withholding . . . because Congress has weighted the balance so heavily in favor of disclosure").

That the policy of disclosure is stronger under Exemption 6 than anywhere else in FOIA also is confirmed by this Court in comparing Exemption 6 to Exemption 7(C) in *Reporters Committee*, *supra*, 489 U.S. at 756:

> Exemption 7(C)'s privacy language is broader than the comparable language in Exemption 6 in two respects. First, whereas Exemption 6 requires that the invasion of privacy be "clearly unwarranted," the adverb "clearly" is omitted from Exemption 7(C). This omission is the product of a 1974 amendment adopted in response to concerns expressed by the President. Second, whereas Exemption 6 refers to disclosures that "would constitute" an invasion of privacy, Exemption 7(C) encompasses any disclosure that "could reasonably be expected to constitute" such an invasion. This difference is also the product of a specific amendment. Thus, the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files. (Footnotes omitted).[19]

[19] *See also FBI v. Abramson*, 456 U.S. 615, 629 n.13, 72 L.Ed.2d 376, 102 S.Ct. 2054 (1982) ("The distinction [between Exemptions 6 and 7] is meaningful"); *Halloran v. Veterans Admin.*, 874 F.2d 315, 319 (5th Cir. 1989); *Fund for Const. Gov't v. Nat'l Archives*, 656 F.2d 856, 862 (D.C. Cir. 1981); *Powell v. Dep't of Justice*, 584 F.Supp. 1508, 1528 (N.D. Cal. 1984) ("Exemption 6 is a more narrow exemption"); *Congressional News Syndicate v. Dep't of Justice*, 438 F.Supp. 538, 541 (D.D.C. 1977) ("The difference in breadth [between Exemptions 6 and 7] is attributable to the inherent distinction between investigatory files and personnel, medical and similar files: that an individual's name appears in files of the latter kind, without more, will probably not engender comment and speculation, while, as the Government argues here, an individual whose name surfaces in connection with an investigation may, without more, become the subject of rumor and innuendo").

III. The Balancing Of Privacy And Public Interests Favors Disclosure In This Case

Because the core philosophy of FOIA is that of disclosure, Exemption 6 balancing first requires an inquiry into whether a substantial invasion of personal privacy is implicated by a FOIA request, and then only if such an invasion is implicated, the next step is to evaluate the public interests that may be served by disclosure of the requested information. *NARFE*, *supra*, 879 F.2d at 874. "If no significant privacy interest is implicated", the inquiry ends and "FOIA demands disclosure." *Id.*, *citing Tax Analysts*, *supra*, 492 U.S. 136, 109 S.Ct. at 2850-53.[20]

The State Department again attempts to rewrite FOIA by asking the Court first to address public disclosure interests, and then if necessary, to look to privacy interests. The State Department argues that because there is no public interest in the returnees' names in this case, an inquiry into the alleged privacy invasions "should be unnecessary." Pet.Br. 27. The State Department by this formulation asks this Court to avoid the statute, the legislative history and the precedent of this Court, all of which make plain that disclosure is the rule under FOIA (especially when Exemption 6 is implicated), and that it is the agency's burden to justify withholding. If the State Department does not like the Freedom of Information Act as Congress drafted it, the Department may ask Congress to amend the statute. The State Department must abide by its burden under the law, and to the extent the agency cannot show a substantial invasion of personal privacy, FOIA demands disclosure.

[20] *See also Halloran*, *supra*, 874 F.2d at 319; *Washington Post*, *supra*, 690 F.2d at 261; *Campbell v. U.S. Civil Service Commission*, 539 F.2d 58, 61 (10th Cir. 1976); *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 136 (3rd Cir. 1974); *Rural Housing Alliance v. U.S. Dep't of Agric.*, 498 F.2d 73, 77, *motion denied*, 511 F.2d 1347 (D.C. Cir. 1974).

A. The State Department Fails To Meet Its Burden In Showing A Clearly Unwarranted Invasion Of Personal Privacy

The State Department fails to meet its privacy burden in several critical respects. First, the agency raises only possibilities with respect to invasions of privacy. Second, the declarations relied on by the agency are conclusory and insufficient as a matter of fact and law. Third, the agency cannot overcome the weight of the law that requires disclosure on the facts of this case. Finally, the agency's confidentiality arguments are unfounded.

1. The Agency Raises Only Mere Possibilities

Exemption 6 is "directed at threats to privacy interests more palpable than mere possibilities." *Rose*, *supra*, 425 U.S. at 380 n.19.[21] Several courts have suggested that the threshold production of documents alone must constitute the clearly unwarranted invasion of personal privacy under Exemption 6. *See*, *e.g.*, *Arieff*, *supra*, 712 F.2d at 1468 ("According to the statute, it is the very 'production' of the documents which must 'constitute a clearly unwarranted invasion of personal privacy'") (Scalia, J.); *Disabled Officer's Ass'n v. Rumsfeld*, 428 F.Supp 454, 457-58 (D.D.C. 1977).[22]

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[21] *See also NARFE*, *supra*, 879 F.2d at 877; *Arieff v. Dep't of Navy*, 712 F.2d 1462, 1467 (D.C. Cir. 1983) (J. Scalia); *Citizens*, *supra*, 602 F.Supp. at 538; *Nat'l Ass'n of Atomic Vet. v. Dir. Defense Nuc. Agency*, 583 F.Supp. 1483, 1487 (D.D.C. 1984).

[22] The State Department argues that one must look to derivative invasions of privacy: "The purpose for which respondents seek this information adds further to the assault upon the privacy values protected by the Act. Respondents seek these names and addresses so that they can go to Haiti, track down the interviewed Haitian citizens and 'check what happened'. . . ." Pet.Br. 30. Ironically, one of the State Department's principal arguments urging reversal is that the derivative use for information should *not* be considered on the public interest side of the balance.

Here, the mere disclosure of the names of the returnees will not cause a clearly unwarranted invasion of personal privacy. Moreover, even with respect to any possible derivative or secondary invasions of privacy, the State Department only raises unfounded "possibilities." If the returnees truly have not been persecuted, as United States officials have proclaimed publicly, the returnees will not be effected by being asked for such benign confirmation. Even more importantly, the returnees will be free not to respond to any inquiries regarding their circumstances in Haiti.

Thus, the best the State Department can do is argue that the revelation of the returnees' names may cause the perception of "cooperation with United States officials by foreigners [which] is not always greeted with indifference by the foreigner's government or countrymen." Pet.Br. 29. However, the State Department only can point to circumstances in *Iran* as described in a different case. *Ibid.* The true facts in this case indicate that the Miami INS District Director was so convinced that privacy interests did not exist that he was quoted as offering "to provide names of [the] Haitians who have been sent back so that doubters can go to Haiti and speak to the people directly." J.A.28.[23]

The State Department otherwise states that the interview reports on the returnees contain personal information such as marital status, employment history, and living conditions.[24] The agency maintains that "[d]isclosure of such information quite plainly constitutes a 'clearly unwarranted' invasion of privacy

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[23] The government's attorney also indicated that the possibility for violation of privacy interests was remote because of her belief that "[t]he chances of being able to track down these individuals and find out whether their statements are accurate seem unlikely . . . [because] since that time the Government of Haiti has been in a great deal of flux." J.A. 66.

[24] Many of the interview reports are not as detailed as the State Department suggests and they do not contain much personal information regarding the interviewees. *See*, *e.g.*, the State Department's Lodging at 35-37 summarily and collectively referring to interviews of 33 Haitians.

under this Court's cases." Pet.Br. 30. The State Department fails to understand that this information already has been disclosed, and the agency avoids explaining factually how the revelation of the returnees' names would create a clearly unwarranted invasion of personal privacy. What remains of the State Department's privacy argument then is the agency's misplaced reliance on conclusory declarations, distinguishable cases, and unfounded arguments concerning alleged promises of confidentiality.

2. The State Department's Conclusory Declarations Are Insufficient

The State Department's entire showing on the issue of invasion of privacy boils down to Mr. Eaves' speculative statement that the disclosure of the returnees' identities would "subject them or their families to *possible* embarrassment in their social and community relationships." J.A. 43. (Emphasis added).[25] Mr. Eaves does not provide any supporting factual detail describing the likelihood and the actual type of social and community embarrassment to be suffered by these individuals. Indeed, *not a single returnee professed a concern about social and community embarrassment as reflected in the interview reports*. State Department Lodging 1-40.

Accordingly, the State Department's privacy showing, which is based on the Eaves declaration, is factually deficient as a matter of law. *See King v. Dep't of Justice*, 830 F.2d 210, 218-19 (D.C. Cir 1987) (Declarations are insufficient if they are "'conclusory, merely reciting statutory standards, or if they are too vague or sweeping'"); *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982) (The Courts will not "accept glib government assertions" and supporting declarations "must be 'relatively detailed' and nonconclusory"); *Campbell v. Dep't of HHS*, 682 F.2d 256, 265-66 (D.C. Cir. 1982) (The government "does not meet its burden

[25]The declarations of Messrs. Melton and Byrd do not attempt to describe alleged invasions of the returnees' privacy. Rather, these declarations attempt to support waived Exemptions 1 and 7. (J.A. 53-64).

. . . through conclusory statements, unaccompanied by supporting detail that these exceptions are applicable"); *Church of Scientology of California v. U.S. Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1979); *Citizens*, *supra*, 602 F.Supp at 539; *Powell*, *supra*, 584 F.Supp. at 1512.

3. The Act, The Legislative History And The Cases Provide For Name Disclosure In Appropriate Circumstances

The State Department cites several cases (Pet.Br. 28)[26] in which courts have withheld names from disclosure under Exemption 6, and then the agency states that "[i]n no FOIA case of which we are aware has such personal information [names and/or identifying details] been ordered disclosed" (Pet.Br. 30).[27] The State Department creates the impression that names always have been and always should be withheld from disclosure under Exemption 6.

The reality, however, is that the legislative history to Exemption 6 and the long line of cases under this exemption support name disclosure in appropriate circumstances. The principal sponsor of the 1974 amendments to FOIA stated that "deletion of names and identifying characteristics of individuals would in *some cases* serve the underlying purpose of Exemption 6." *Rose*, *supra*, 425 U.S. at 375, *quoting* 120 Cong. Rec. 17,018 (1974). (Emphasis added). Furthermore, the Senate Report provides that the balance to be drawn under Exemption 6 is one between "the protection of an individual's private affairs from *unnecessary* public scrutiny, and the preservation of the

[26]These cases are distinguishable because the privacy interests were not outweighed by public disclosure interests.

[27]The notion that the State Department has provided information on some of the returnees with respect to marital status, employment status, and living conditions does nothing to satisfy the public interests favoring disclosure of the returnees' names, as discussed in ARGUMENT Section III. B.

public's right to governmental information." *Rose*, *supra*, 425 U.S. at 380 n.19, *quoting* S. Rep. No. 813 at 9. (Emphasis supplied by this Court). Thus, identifying information is to be disclosed under Exemption 6 in certain cases in which privacy interests are less significant than the necessity for public scrutiny.

Not surprisingly, the courts frequently order disclosure of names in a variety of circumstances when the privacy interests under Exemption 6 are outweighed by the public interests in the information requested. *See Cochran v. United States*, 770 F.2d 949, 956 n.9 (11th Cir. 1985) (Disclosure of identifying details and disciplinary information on military officer accused of alleged improprieties); *Arieff*, *supra*, 712 F.2d 1462 (Disclosure of information possibly identifying individuals as taking particular drugs for particular diseases) (Scalia, J.); *Kurzon*, *supra*, 649 F.2d 65 (Disclosure of names and addresses of unsuccessful applicants for research grants from the National Cancer Institute); *Columbia Packing Co., Inc. v. U.S. Dep't of Agriculture*, 563 F.2d 495 (1st Cir. 1977) (Disclosure of personnel records of two former federal meat inspectors who were convicted of taking bribes); *Ditlow*, *supra*, 517 F.2d 166, 170 (Disclosure of names and addresses contained in customs declaration forms "would result in less than a substantial invasion of privacy"); *Painting Indus. of Hawaii Mkt. Recovery Fund v. Dept of Air Force*, 756 F.Supp 452 (D. Hawaii 1990) (Disclosure of names, addresses, phone numbers and social security numbers of employees referred to in payroll records); *Nat'l Ass'n of Atomic Vet.*, *supra*, 583 F.Supp 1483 (Disclosure of names and addresses of present and former military service members who participated in an atmospheric nuclear weapons testing program); *Norwood v. FAA*, 580 F.Supp. 994 (W.D. Tenn. 1983) (Disclosure of the identities of former air traffic controllers who had been terminated); *Nat'l Western Life Ins. Co. v. United States*, 512 F.Supp. 454 (N.D. Tex. 1980) (Disclosure of the names and duty stations of employees of the United States Postal Service employed in two cities); *Disabled Officer's Ass'n*, *supra*, 428 F. Supp. 454 (Disclosure of names and addresses of retired disabled military flight officers); *Philadelphia Newspapers Inc. v. Dep't of Justice*, 405 F.Supp. 8 (E.D. Pa. 1975) (Disclosure of the names of

persons who wrote letters recommending parole for a particular prisoner).[28]

Respondents by this brief do not argue that names and addresses always, or even in the majority of cases, should be disclosed under Exemption 6. Rather, the names and addresses of the returnees should be disclosed in this case, and in other appropriate circumstances, when such information will help shed light on the conduct of the government.[29]

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[28] *See also* the following cases providing for name disclosure in the labor context: *I.B.E.W. Local v. No. 5 v. HUD*, 852 F.2d 87 (3rd Cir. 1988) (Disclosure of payroll records including employees' names, addresses, and social security numbers); *Dep't of Navy v. FLRA*, 840 F.2d 1131 (3rd Cir.) (Disclosure of names and addresses of bargaining unit members), *cert. dismissed*, 488 U.S. 881 (1988); *Dep't of Air Force v. FLRA*, 838 F.2d 229 (7th Cir.) (Disclosure of home addresses of employees to union), *cert. dismissed*, 488 U.S. 880 (1988); *U.S. Dep't of HHS v. FLRA*, 833 F.2d 1129 (4th Cir. 1987) (Disclosure of names and addresses of bargaining unit employees), *cert. dismissed*, 488 U.S. 880 (1988); *Amer. Fed. of Gov. Emp., Local 1760 v. FLRA*, 786 F.2d 554 (2nd Cir. 1986) (Disclosure of employee addresses to union); *I.B.E.W. of Elec. Workers v. HUD*, 763 F.2d 435 (D.C. Cir. 1985) (Disclosure of names of employees listed on payrolls); *Getman*, *supra* 450 F.2d 670 (Disclosure of names and addresses of employees eligible to vote in certain elections).

See also the following cases providing for identity disclosure under Exemption 7: *Common Cause v. Nat'l Archives & Rec. Serv.*, 628 F.2d 179 (D.C. Cir. 1980) (Remand to consider disclosure of identities of candidates for federal office to whom certain corporations admitted making or were alleged to have made unlawful campaign contributions); *Congressional News Syndicate*, *supra*, 438 F.Supp. 538 (A news syndicate was entitled to production of records as to contributors and recipients of a fund for the "Townhouse Operation" despite the contention that opprobrium would attach to anyone whose name was linked with a Watergate investigation).

[29] *Cf. Reporters Committee*, *supra*, 489 U.S. at 773 ("In this case - and presumably in the typical case in which one private citizen is seeking information about another - the requestor does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official").

4. The State Department's Confidentiality Arguments Are Unfounded

The State Department "does not contend that the mere fact that the government obtained the information under a pledge of confidentiality invariably controls the question of disclosure under Exemption 6." Pet.Br. 31.[30] The agency obviously understands that supposed promises of confidentiality cannot be determinative, because otherwise agencies easily could override the statute and avoid the disclosure requirements of FOIA simply by promising confidentiality whenever the government wants to withhold information. Indeed, "to allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate." *Washington Post Co., supra*, 690 F.2d at 263.[31] The government, in fact, has admitted in a reverse-FOIA case that even though "there was a general understanding that [certain] information . . . would be held in confidence . . . such a promise is without legal effect." *Sonderegger v. Dep't of Interior*, 424 F.Supp. 847, 853 (D. Id. 1976).

The State Department nevertheless argues that "the circumstances under which the interviews were conducted in this case provide a highly reasonable context for the government to have offered confidentiality" because of national defense or foreign policy concerns under Exemption 1. Pet.Br. 32. This argument fails for several reasons. First, it is undisputed that Exemption 1 was waived, and therefore this exemption is not before the Court. Second, as the Eleventh Circuit stated, "it [is] difficult to believe that the redacted information implicates

[30]Interestingly, the "information" at issue, the names and addresses of the returnees, already was in the possession of the State Department prior to the interviews. Pet.Br. 4. Accordingly, it cannot be said that this information was obtained "under a pledge of confidentiality."

[31]*See also Ackerly v. Ley*, 420 F.2d 1336, 1340 n.3 (D.C. Cir. 1969) (Promises of confidentiality "cannot, in and of themselves, override the Act"); *Robles, supra*, 484 F.2d at 846 ("[W]hile, perhaps, a promise of confidentiality is a factor to be considered, it is not enough to defeat the right of disclosure").

compelling national security concerns in light of the government's failure *for almost two full years* to bring these concerns to the attention of the court or the plaintiffs." 908 F.2d at 1557. (Emphasis in original). Third, the State Department's national defense/foreign policy argument is inappropriate, as it has no bearing on the traditional inquiry into any invasion of the returnees' privacy under Exemption 6. *See Washington Post Co., supra*, 690 F.2d at 260 n.23 ("Exemption 6 is concerned with protecting personal privacy, and no more"); *Board of Trade of Chicago v. Commodity Futures Trad. Comm'n*, 627 F.2d 392, 400 (D.C. Cir. 1980).[32]

The State Department's confidentiality argument also fails as a matter of fact. The only support in the record for the alleged promises of confidentiality are (a) Mr. Eaves' conclusory statement that "those who were interviewed consented to the procedures with the understanding that their conversations with Embassy officers would be conducted under conditions of privacy and confidentiality" (J.A. 42-43), and (b) Mr. Melton's summary statement that the interviews were conducted "on the understanding that [the returnees'] identities would be kept confidential" (J.A. 54).[33]

This slim evidentiary showing should have no effect on the Exemption 6 balancing in this case, especially in light of the fact that *nowhere in the 40 pages of interview reports*, which were drafted close in time to the interviews and which summarized the interviews, *is there even one reference to a promise of*

[32]One must wonder whether it was proper as a matter of law for the State Department affirmatively to take advantage of the alleged promises of confidentiality, as such promises deny political asylum applicants the opportunity to "inspect, examine, and rebut" the BHRHA advisory opinions under Title 8 C.F.R. § 208.10(b). *See also* 8 U.S.C. § 1252(b).

[33]These alleged promises are similar to those alleged in *Sonderegger, supra*, 424 F.Supp. at 853, wherein the government admitted that the promises were "without legal effect."

confidentiality. State Department Lodging 1-40.[34] The State Department has failed its duty as recognized by the courts to present facts showing that: (1) promises of confidentiality were given even if not requested by the returnees, (2) promises of confidentiality were made to all of the returnees interviewed, and (3) the identities of the returnees have been held in strict confidence. *See, e.g., Robles, supra*, 484 F.2d at 846.

B. Significant Public Interests Support Disclosure

Because the State Department has failed to meet its burden of showing a substantial invasion of personal privacy, FOIA mandates disclosure of the returnees' names. This is particularly true because significant public interests support disclosure. The State Department counters with a "derivative use" argument, but this argument is fundamentally flawed.

1. Provision Of The Names Will Help Shed Light On The Government's Activities and Statements Related To The Interdiction Program and Persecution In Haiti

The law is plain that the public has an interest in determining whether the government is conducting its duties properly and whether the government is disseminating accurate information to the public. For example in *Citizens, supra*, 602 F.Supp. at 537, the court ruled that "the public has an interest in learning that [the government] is not abiding by its alleged commitment to effectively monitor the health effects of herbicide spraying." Furthermore, in *Nat'l Ass'n of Atomic Vet., supra*, 583 F.Supp. at 1487, the court held that the public had an interest in assessing the effectiveness of the government's dissemination of information to veterans relating to a government study on the adverse health effects of exposure to atomic radiation. The

[34]The reports indicate the possibility that the alleged promises were not made. *See, e.g.*, State Department Lodging 12, 15, 17 and 19 (reporting that interviewees "approached" the interviewers and were "eager" and "pleased" to speak to them).

court ruled that disclosure properly would enable the requester to conduct its own studies which "may shed light on the validity of the methodology used and the conclusions reached by the government in its study." *Id.*

The State Department nevertheless argues that the names of the returnees in this case are "irrelevant" to "an understanding of the manner in which the government was supervising and administering the interdiction program." Pet.Br. 20. Yet, the uncontroverted findings of the Courts below demonstrate significant public interests supporting disclosure of the returnees' names. The District Court and the Eleventh Circuit found that the names: (a) will help to guarantee the safe relocation of the returnees, (b) will afford the opportunity to ascertain whether the United States is monitoring properly Haiti's compliance with its obligations not to persecute returnees, and (c) will provide a mechanism to determine whether United States officials have been accurate in stating that the returnees have not been persecuted. 725 F.Supp. at 505; 908 F.2d at 1555.[35]

The public interest in assessing the State Department's conduct and the accuracy of its statements with respect to the interdiction program and persecution in Haiti is heightened by the fact that the agency admits that Haiti has "a lengthy history of political repression" (Pet.Br. 3) in that "Haiti suffered for 29 years under the notorious 'Papa Doc' and 'Baby Doc' Duvalier dictatorships, followed by five years of military rule" (Pet.Br. 3 n.2), and by the fact that the record shows evidence of persecution in Haiti (J.A. 28, 29, 36 and 69).

Moreover, to obtain disclosure, Respondents need not show that the State Department has been guilty of misconduct or has made false statements. The public, rather, is entitled to an inquiry by which it can decide for itself whether agency action has been proper. Disclosure is appropriate even if in the final analysis it becomes apparent that all government actions and

[35]There also is a public interest in "fair and consistent" political asylum proceedings in this country. *Cf. Norwood, supra*, 580 F.Supp. at 999.

statements were proper. *See IBEW Local v. No. 5, supra*, 852 F.2d at 92; *Citizens, supra*, 602 F.Supp. at 540.[36] Accordingly, in appropriate circumstances courts permit disclosure of names and addresses of persons who have knowledge pertaining to governmental activities. *See* ARGUMENT Section III.A.3. and the cases cites therein.

2. The State Department's "Derivative Use" Argument Improperly Asks The Court to Abandon Traditional Exemption 6 Balancing Mandated By The Act, The Legislative History, And The Precedent Of This Court

The State Department argues that information never can be disclosed under Exemption 6 when the "derivative use" for the information is "to check the accuracy of the government's records at their source." Pet.Br. 21. The State Department's argument represents an inappropriate invitation completely to abandon traditional Exemption 6 balancing as intended by Congress and as enforced by this and other courts.

The State Department first argues that the courts cannot look to the "derivative use" for information because to do so would entitle each requestor to omnibus access to all information; "[a]ll . . . a requestor would be required to do is frame his request in terms of a desire to contact the individuals involved and interview them as part of an investigation into the accuracy of the government's records and the fairness or effectiveness of the administration of those governmental programs." Pet.Br. 22.

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[36]The court in *Washington Post Co., supra*, 690 F.2d at 264, stated: "[T]he purpose of FOIA is to permit the public to decide *for itself* whether government action is proper. Congress was all too aware of the '[i]nnumerable times' that agencies had withheld information under prior law 'only to cover up embarrassing mistakes or irregularities.' S. Rep. at 3. FOIA was designed to prevent such incidents and establish instead '[t]he right of the individual to be able to find out how his government is operating.' H.R. Rep., *supra*, note 23, at 6, 1966 U.S. Code Cong. & Ad. News at 2423. In light of that purpose, the public interest in disclosure is not diminished by the possibility or even the probability that [the government] is doing its . . . job right." (Emphasis in original and footnotes omitted).

The State Department's premise that a "derivative use" request necessarily opens the floodgates of disclosure is false. Under traditional Exemption 6 balancing, the courts are required first to analyze privacy interests and then weigh any such interests against public interests in disclosure. If significant privacy interests outweigh public disclosure interests in the "derivative use" context, withholding is proper.[37] The State Department provides no plausible explanation as to why this Court should turn FOIA on its head by abandoning traditional Exemption 6 balancing, especially when this congressionally mandated approach fully takes into account all interests, even in the "derivative use" scenario.[38]

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[37]In this case, privacy interests are speculative and public interests are paramount. The State Department only raises "possible embarassment" in terms of alleged privacy invasions. The public, on the other hand, has interests in the safe relocation of the returnees, the opportunity to ascertain whether the United States is monitoring properly Haiti's obligation not to persecute returnees, a mechanism to determine whether the United States has been truthful about persecution of the returnees, and fair and consistent political asylum proceedings. In other cases, like this one, in which requesters seek the identities of persons they can contact to monitor government activities and statements, and in which privacy interests are outweighed by disclosure interests, courts properly have ordered disclosure. *See, e.g., Nat'l Ass'n of Atomic Vet., supra*, 583 F.Supp. 1483 (Disclosure of names and addresses of present and former military service members who participated in an atmospheric nuclear weapons testing program because of the public interest in monitoring the government's dissemination of information and methodology used with respect to medical studies related to the nuclear weapons testing); *Citizens, supra*, 602 F.Supp. 534 (Disclosure of the results of medical tests and data pertaining to the health effects of herbicide spraying because of the significant public interest in ascertaining whether the government effectively was monitoring the health effects of spraying, even though disclosure could lead to linking personal medical tests to particular individuals).

[38]The State Department cites *Hopkins v. HUD*, No. 90-9269 (2nd Cir. April 1, 1991), as a case which "rejected the proposed 'derivative use' theory precisely because it would swallow entirely the privacy protections afforded by Exemption 6." Pet.Br. 22. In *Hopkins*, however, the court employed traditional Exemption 6 balancing in a "derivative use" case and found based on the facts of that case that privacy interests outweighed disclosure interests because of the "attenuated relationship" between the information sought and "governmental activity". The Court did not hold, as the State Department suggests, that derivative public use for information cannot be considered in traditional

The State Department next argues that the "derivative use" for information cannot be considered under Exemption 6 because such an analysis "is flatly inconsistent with the holding in *Reporters Committee*." Pet.Br. 23.[39] The fallacy of the State Department's argument is revealed by the very language of this Court in *Reporters Committee*:

> [The] basic policy of "'full agency disclosure unless information is exempted under clearly delineated statutory language,'" indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on the agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct. In this case - and presumably in the typical case in which one private citizen is seeking information about another -

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Exemption 6 balancing.

[39]The State Department cites several other cases, all of which are distinguishable.

The State Department places some reliance on the holding in *Rose, supra*, 425 U.S. 352. However, the requesters in *Rose* asked that identifying information be deleted from the documents requested because in that case there was not a great public interest that would emanate from disclosure of the identities of the cadets.

Kissinger v. Reporters Committee, 445 U.S. 136, 150-154, 63 L.Ed.2d 267, 100 S.Ct. 960 (1980), simply stands for the proposition that FOIA does not entitle a requester to records that are not in the possession of the requested agency. Here, it is undisputed that the unedited interview reports are in the possession of the State Department.

Safecard Services, Inc. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991), simply involved the withholding of information pertaining to an SEC investigation under Exemption § 5 and 7(C).

Reed v. NLRB, No. 90-5147 (D.C. Cir. March 15, 1991), addressed the narrow issue of Excelsior lists.

> requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official. 489 U.S. at 773. (Citation omitted).

This Court in *Reporters Committee* afforded the opportunity in the atypical case for disclosure of information concerning individuals under traditional Exemption 6 balancing when that information "sheds light" on government conduct. In this less than typical case, there are significant public interests in learning the identities of the returnees so that the public can shed light on the conduct of the government with respect to the interdiction program and persecution in Haiti.

The State Department next seems to argue that the Court may not look to the specific need of Respondents for the unedited interview reports. Respondents do not dispute that the Court should focus on the greater public interest in disclosure, rather than looking exclusively to Respondents' interests in the information requested. The public certainly has an interest in knowing how the government fulfills its promises to provide fair asylum hearings, prevent persecution, and knowing whether the government tells the public the truth about these matters. Respondents are part of the public and their use for the information should be included with the framework of the public interest. *See Amer. Fed. of Gov't Emp., Local 1760, supra*, 786 F.2d 554; *Arieff, supra*, 712 F.2d at 1468 (Scalia, J.); *Ditlow, supra*, 517 F.2d at 172 n.21. Not surprisingly, even the State Department at times looks to the "purpose for which Respondents seek this information." Pet.Br. 30. *See also* J.A. 66 (referring to Respondents' "purpose").[40]

The State Department falls back and argues that "[a]n approach that turns upon a proposed use for the government

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[40]It is interesting to note that then D.C. Circuit Judge Starr stated in his concurring opinion in *Reporters Committee* that the requesters' intended use for the requested information should be considered. 816 F.2d at 745.

records, rather than on the intrinsic informational value of the records, would introduce unworkable speculation and complexity into the application of Exemption 6." Pet.Br. 26. On this point Respondents simply note that the FOIA "requirement that the agency support its decision to withhold with reasonable authority places a duty on the agency to analyze the relevant law - to recognize distinguishing factors that make prior cases inapplicable to the case at hand, and to examine cases other than those that tend to support a decision to withhold." *Local 598 v. Dep't of Army Corps of Engineers*, 841 F.2d 1459, 1463 (9th Cir. 1988). Either the State Department forgets that it has the highest burden under the statute in substantiating Exemption 6 withholding, or the agency improperly attempts to rewrite and lessen its statutorily mandated duties.

In sum, under traditional Exemption 6 balancing, the District Court, affirmed by the Eleventh Circuit, found that any alleged invasions of privacy were outweighed by the significant public interests in disclosure in this case. The State Department has not met its heavy burden under Exemption 6 to justify withholding, as the agency has failed to demonstrate that these findings and the decision to order disclosure of the returnees' names were clearly erroneous. This Court should affirm.

CONCLUSION

In accordance with the foregoing, the judgment of the Eleventh Circuit should be affirmed.

Respectfully submitted.

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APPENDIX

[Emblem] UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520
Office of Asylum Affairs
Bureau of Human Rights
and Humanitarian Affairs

April 1991

SITUATION IN HAITI

This office has no independent material about this specific applicant. Information on human rights practices in Haiti may be found in the State Department's current *Country Reports on Human Rights Practices*. The following additional material may be helpful in your review of this application for asylum.

The Haitian situation in recent years has been marked by extreme poverty, rapid political change (5 governments since 1986), and an upsurge in common crime. Many thousands of people have left Haiti seeking a better economic life and/or a more stable environment, but in our experience, very few have been able to demonstrate they departed out of a well-founded fear of persecution for political or other reasons covered by the Immigration and Nationality Act, as amended.

After the fall of Jean-Claude Duvalier in 1986, some adherents of the old regime left Haiti for the Dominican Republic, the U.S. and other countries. There have been instances of violence or intimidation by government and vigilante forces since 1986 against a few, small, extreme left organizations, as well as main-line groups. These and other acts of political violence have generally been sporadic and part of the general political turmoil of the times.

An unsettled atmosphere, common crime, and occasional political violence are of themselves usually insufficient to establish particular individuals' claims to asylum. Few people

have even sought to make other than a generalized claim.

Because of heavy popular pressure, Prosper Avril resigned as president on March 10, 1990, and Mrs. Ertha Pascal-Trouillot, a justice of the Supreme Court, was sworn in as president three days later. Under her leadership, a general election which international observers commended as free and fair was held on December 16, 1990. Father Jean-Bertrand Aristide won an overwhelming victory and on February 7, 1991 became Haiti's first president to be elected in democratic elections. He has been a longstanding opponent of the Duvaliers and despotic rule.

The phenomenon of "boat people" -- Haitians setting out in small boats to enter the U.S. -- generally describes persons seeking to improve their conditions economically. We have no reports of any "boat people" returned through the migrant interdiction program being persecuted thereafter.

The U.S. Embassy studied migrants in the 1983-85 period and interviewed a substantial number after they had returned to their home areas. No cases of persecution were uncovered.

HAITIAN MIGRANT INTERDICTION OPERATION[1]
OPERATION INSTRUCTIONS
(Revised March 1, 1988)

PART I - GENERAL BACKGROUND

The following directives are to be followed by INS employees assigned to U.S. Coast Guard cutters interdicting vessels at sea pursuant to Presidential Proclamation # 4685 and Executive Order #12324, dated September 29, 1981. The duties of INS employees assigned to the Coast Guard cutters is limited to matters related to the interview of persons on board with respect to documentation relating to the entry into the United States and possible evidence of refugee status. the over-all function INS officers are responsible for is to ensure that the United States is in compliance with its obligations regarding actions toward refugees, including the necessity of being keenly attuned during the interdiction program to any evidence which may reflect an individual's well-founded fear of persecution by his or her country of origin for reasons of race, religion, nationality, membership within a particular social group or political opinion.

PART II - WHILE ABOARD COAST GUARD VESSELS

At all times, the INS officer and Interpreter will be under the direction of the Commanding Officer (CO) and the Boarding Officer, with the exception of the process of making the required INS determinations.

The INS team will answer all boarding calls by reporting to the bridge. The interpreter will be prepared to assist with

[1] The following document, though not in the record in this case, has been repoduced from a certified copy which was introduced into evidence at trial in another Freedom of Information Act case, *Ray v. U.S. Dep't of Justice, INS*, Case No. 89-288-CIV-RYSKAMP (S.D. Fla. Trial Held Apr. 5 and 30, 1990). The original certified copy of this document (Plaintiff's Exhibit 7B and 7C) has been lodged with this Court.

communication with the vessel. When a suspect vessel has been identified and the CO of the Coast Guard cutter has decided to board the vessel, the team will then report to the Boarding Officer at the small boat station. A writing pad will be carried to record any information required for the boarding report.

The INS team will accompany the boarding officers upon the initial boarding and will assist with translating, reviewing documentation, and in interrogating. If the vessel is engaged in legitimate trade, and all documentation is in order, the INS team will assist the Boarding officer in gathering other information for preparation of the boarding report.

When undocumented migrants are located, the INS Officer will determine nationality, destination, and purpose of the trip. If it is determined that they are enroute to the United States, the Boarding Officer will inform them that they cannot legally continue to the United States and must be returned to their home country. The CO will then be informed that there are (number of male, female and children) to be returned to their country.

After the decision to repatriate, generally all the migrants are taken aboard the cutter. (If for some reason the migrants are repatriated on their own vessel, the INS team as well as the Boarding Officer will remain with them). The INS Officer will then assist the Operations Officer aboard the cutter with the SITREP (situation report) required at this time.

List of Migrants- After the initial SITREP is completed, the INS team will immediately interview each migrant separately. During the interviews, a list will be prepared, including the name, place of birth, date of birth and home address. The INS team will ask every individual why he is leaving his country, why he is going to the United States, and whether he/she has any fear of returning to his/her country.

Persecution Claims- If there is any indication that the individual does fear returning, the INS officer will expand his interview to include questions in detail concerning any problems with previous arrests or persecution. If the Officer is satisfied that the claim has merit, he will report it to the Commanding Officer, who will send an immediate message for transmittal to CORAP. If CORAP concurs, they will authorize the District Director, Miami to parole the individual for "humanitarian reasons"; and arrangements will be made for transportation to Miami. In these cases a written statement, or Form I-589(in boarding bag), signed by the individual, must be completed. If the INS Officer has doubts concerning the veracity of the persecution claim, he will forward the questions and answers in the statement or Form I-589, as well as biographic information, (BHRHA) with an info copy to CORAP. After the opinion is received, final determination will be made as to the disposition of the case.

Narrative Report- During the interviews, the INS Officer will also ascertain information for preparation of the narrative report. This report will include the name and description of the vessel, the number of crew and passengers,point of departure, destination, events before and during the voyage, general health of the migrants, general smuggling activities, and a statement that none of the migrants fear being returned to their country. No information concerning an asylum claim will be provided the authorities of that country.

The list of names, etc. and the narrative will be typed. When time is of the essence, you may request that a Coast Guard yeoman assist with the typing. Thirteen copies of each will be made. One each will be provided to the Operations Officer on board the cutter, the Coast Guard Liaison Officer in Port Au Prince, and one for the HMIO office in Miami. The original and the remaining copies will be provided to the U.S. Embassy representative in Port Au Prince for disposition to the Haitian authorities.

* * *

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No. 90-747

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF STATE, PETITIONER

v.

MICHAEL D. RAY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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This Court's decisions have articulated a "workable formula which encompasses, balances, and protects" the interest in personal privacy as well as the public interest in "the fullest responsible disclosure" of government records (*EPA* v. *Mink*, 410 U.S. 73, 80 (1973) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). That "workable formula" does not require, as respondents would suggest, that the interest in personal privacy be overborne whenever a party contends that possession of the requested information might lead to further, derivative non-governmental inquiries that – depending upon the vigor, motivation and result of those inquiries – might ultimately shed some light on governmental activities. Such a remote and tenuous rationale for overriding privacy interests finds no support in this Court's decisions.

Instead, this Court has made clear that private information that itself sheds no light upon the conduct of government is exempt from disclosure under the FOIA. While there is a public interest in the disclosure of information that directly reveals the government's conduct of its affairs, the deletion of personal identification information is "unquestionably appropriate because the names of the particular" persons involved are "irrelevant to the inquiry into the way the" government administers its responsibilities. *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). In thus reconciling the competing interests of disclosure and personal privacy, the Court has emphasized that "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." *Id.* at 765.

Respondents seek to ignore this Court's admonition by contending (i) that the information requested in this case does not involve a "substantial" invasion of personal privacy (Resp. Br. 21) and (ii) that respondents' interest in making use of this information outweighs the privacy interests of the persons who have provided information to the government under assurances of confidentiality (Resp. Br. 21-36). These contentions are not substantial.

The court of appeals specifically acknowledged that there are "significant privacy interests at stake" in this case (Pet. App. 8a). The privacy interests of the Haitian interviewees—who attempted illegal migration to the United States, who agreed to be interviewed under assurances of confidentiality from the State Department, and who described the treatment they had received from their own government as well as their personal, family and economic conditions—

cannot cavalierly be tossed aside as "not significant," as respondents and *amici* would do.[1]

Moreover, as the court of appeals noted, "the disclosure of the Haitians' names and addresses, in and of itself, [would] not tell [respondents] anything about Haiti's treatment of its returnees or the U.S. government's honesty about the matter" (Pet. App. 9a). Conceding, as they must, that the requested information has no direct relevance to an understanding of the government's actions, respondents argue only that their proposed derivative use of this personal information might "help" shed light on the government's activities (Resp. Br. 30). But even if some weight were given to respondents' proposed research plans, the public interest in such a disclosure would be extremely attenuated and speculative. In articulating a "workable formula" for balancing interests under the FOIA, this Court has held that the question "whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made." *Reporters Committee*, 489 U.S. at 771. When "information about private citizens that is accumulated in various government files • • • reveals little or nothing about an agency's own conduct" (*id.* at 773), the Court has concluded that the deletion of personal identification information is "unquestionably appropriate" (*ibid.*).

I. THE HAITIAN INTERVIEWEES HAVE A SUBSTANTIAL PRIVACY INTEREST IN AVOIDING THE DISCLOSURE SOUGHT BY RESPONDENTS

1. The identification of individuals in a specific factual context in government files constitutes an invasion of personal privacy in every instance. The degree of that invasion will, of course, vary according to its context. The in-

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[1] See American Civil Liberties Union Amici Br. 9; Lawyers Comm. for Human Rights Amici Br. 9.

vasion may subject the individual to possible loss of liberty or safety. *Department of State* v. *Washington Post Co.*, 456 U.S. 595 (1982). In other instances, the degree of interference with privacy interests may appear to be relatively slight. See *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d 873 (D.C. Cir. 1989) (identifying the individual as a financially secure retiree), cert. denied, 494 U.S. 1078 (1990).[2] But all of these disclosures implicate the significant personal privacy interest in maintaining "the individual's control of information concerning his or her person." *Reporters Committee*, 489 U.S. at 763.

Respondents and their amici, however, dispute that any genuine privacy interests are presented in this case. See note 1, *supra*. In their view, the State Department seeks to protect only "weak privacy concerns" (Lawyers Comm. for Human Rights Amici Br. 12). But the release of the personal identification information in this case would cause a far more extensive invasion of personal privacy than has been involved in other situations where refusal to disclose has been upheld. See *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d at 878 (identification would invite commercial or charitable solicitations); Pet. Br. 27-28. The interview reports in this case identify the individuals as Haitians who attempted to enter the United States illegally, were returned to Haiti, and voluntarily agreed to be

[2] Such untroubling appearances may often be misleading. For example, the identification of an individual as a user of federal recreation facilities (*Minnis* v. *Department of Agriculture*, 737 F.2d 784 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985)) could be sought by those with adverse interests to verify or contradict an individual's purported whereabouts. While some persons licensed to produce relatively small amounts of wine for home use (*Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133 (3d Cir. 1974)) might not mind receiving mail order catalogs for wine-making equipment, for others the public disclosure of their hobby could be a source of personal embarrassment.

interviewed by United States officials about the conduct of the Haitian government. Pet. Br. 28-29. These reports typically provide information concerning employment, family status and living conditions. *Id.* at 29-30.[3] The interviewees were promised confidentiality by the United States as an inducement for their cooperation. *Id.* at 31-33. Notwithstanding this, respondents have announced their intention to use the requested disclosure of this confidential information to track down and interrogate the interviewees. *Id.* at 30. Upon consideration of these factors, even the court below recognized "that there are significant privacy interests at stake here" (Pet. App. 8a).

2. Respondents contend (Resp. Br. 29) that the interviews were not shown to be confidential in nature. The State Department, however, provided the district court with three sworn statements concerning the conditions of confidentiality under which the interviews were conducted. Based upon review of the documents, personal knowledge, professional judgment, and information made available to him in the course of his official duties, Acting Deputy Director

[3] The failure to redact identifying information would quite obviously infringe "the individual interest in avoiding disclosure of personal matters" (*Reporters Committee*, 489 U.S. at 762). In our initial brief (Pet. Br. 30), we stated that we were not aware of any case where "such personal information [has] been ordered disclosed." Respondents and *amici* cite none. Respondents, however, blatantly misrepresent our statement by converting it into a contention that no court has ever ordered the disclosure of names and addresses (Resp. Br. 25). We have not claimed that the disclosure of names and addresses has *never* been allowed. We do claim, however, that no court has ordered disclosure of information of the highly personal nature involved in this case.

Relying on hearsay in an editorial in a local newspaper, respondents contend (Resp. Br. 23) that, at the early stages of this case, the INS District Director offered to disclose the identities of the Haitian interviewees. Respondents fail to mention, however, that the District Director denied having made such a statement (J.A. 31).

of the Office of Mandatory Review John Eaves stated that "those who were interviewed consented to the procedures with the understanding that their conversations with Embassy officers would be conducted under conditions of privacy and confidentiality." J.A. 40-43. Deputy Assistant Secretary Richard H. Melton, whose duties included responsibility for the conduct of the State Department's policies and operations in Haiti, stated the interviews were conducted on the "understanding that [the interviewees'] identities would be kept confidential." J.A. 53-54, 56. Pratt Byrd, successor to John Eaves, again confirmed "the interviews were conducted on the understanding * * * that the interviewees would not be publicly identified." J.A. 62.

Despite this unambiguous, unrebutted evidence—which respondents disparagingly but erroneously characterize as a "slim evidentiary showing" (Resp. Br. 29)—respondents contend that the confidential nature of the interviews should be ignored because the interview reports do not themselves contain references to a promise of confidentiality (*id.* at 29-30).[4] This argument is both incorrect and illogical. It is illogical because the interview reports do not purport to be verbatim transcripts, and there is no reason to expect that the individual summary reports would make express reference to general proffers of confidentiality. Such references can, however, be found in the reports. One person, who was in hiding in Haiti, was interviewed only after he was "reassured that [the State Department official] was only interested in talking to him for a few minutes about his return to Haiti and would not be sharing the information with any Haitian officials."[5] Pet. Lodging 4.[6] Other reports demonstrate that interviews were conducted in an atmosphere of fear and mistrust and that many of the interviewees deliberately gave false or nonexistent addresses. *Id.* at 1, 3, 7. The documents provide numerous indications of the need for the assurances of confidentiality described in the sworn statements by State Department officials.[7] On this unrebutted and uncontradicted record, both the district court (Pet. App. 28a) and the court of appeals (*id.* at 7a) correctly concluded that the State Department had indeed promised not to reveal the Haitians' identities. There is no basis to disturb these findings of fact concurred in by the two lower courts. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

This is not a case where a court could have reason to question the necessity or appropriateness of the government's promises of confidentiality. The inherently sensitive nature of the State Department's efforts to monitor human rights practices in Haiti provides undeniable justification for conducting these interviews in confidence. The Department requested Haitian nationals to speak frankly about possible mistreatment they received at the hands of their own gov-

[4] Respondents also refer to "supposed[ ]" or "alleged" interviews conducted by the State Department (Resp. Br. i, 3), conveying their apparent view that the State Department's entire showing is a massive, contrived hoax. Needless to say, there is nothing to support respondents' wildly skeptical views.

[5] Because the FOIA requires the agency to "make the records promptly available to *any person*," 5 U.S.C. 552(a)(3) (emphasis added), if respondents were entitled to receive the name of this interviewee, a representative of the Haitian government would also be able to obtain this information.

[6] Copies of certain of the interview reports that are in the record of this case, but which could not practicably be reproduced in the Joint Appendix, have been lodged with the Court.

[7] Some of the interviewees had been confronted by moneylenders who had financed their unsuccessful voyage. C.A. Doc. 36, Attachment at 62. A number of the interviewees had relatives or close friends living illegally in the United States. *Id.* at 70. One of the migrants had been jailed as a trip organizer. *Id.* at 69.

ernment in a setting where the United States had no power or direct authority to protect them. Even the *amici* who support respondents in this case have elsewhere urged that Haitians who attempt illegal migration into the United States "should be advised on an individual basis of the confidential nature of the interviews" and have observed that a "[l]ack of privacy and confidentiality can have grave consequences." Lawyers Comm. for Human Rights, *Refugee Refoulement: The Forced Return of Haitians Under the U.S.-Haitian Interdiction Agreement* 13, 35 (1990).[8] We agree: it is beyond fair dispute that potentially "grave consequences" could accompany disclosure of the redacted identities of these interviewees.[9] *Id.* at 35.

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[8] By strange contrast, the Lawyers Committee has contended in their brief in this case (Amici Br. 9) that "no material privacy interests are at stake" in this case.

The United Nations has also recognized the need for confidentiality in the context of political asylum applications. "In creating such a climate of confidence it is, of course, of the utmost importance that the applicant's statements will be treated as confidential and that he be so informed." Office of the U.N. High Commissioner for Refugees, *Handbook of Procedures and Criteria for Determining Refugee Status* 48 (Geneva, 1979). Recently adopted INS regulations also require that any interviews or other information collected pertaining to asylum applications be held in confidence. See 8 C.F.R. 208.6.

[9] Amici ACLU (Br. 10) and Lawyers Committee (Br. 12) cite *Critical Mass Energy Project* v. *NRC*, 931 F.2d 939 (D.C. Cir., 1991) (petition for rehearing and suggestion for rehearing *en banc* filed June 14, 1991), for the proposition that the government should be required to prove that it was *necessary* for the State Department to offer confidentiality in order to obtain the information. *Critical Mass* involved a dispute under FOIA Exemption 4, 5 U.S.C. 552(b)(4) ("commercial * * * information obtained from a person and * * * confidential"). The proper scope of commercial confidentiality has no bearing on the scope of the personal privacy interests protected under FOIA Exemption 6. In any

Respondents' persistent, though unsupported, attack upon the State Department's showing that the information was obtained under conditions of confidentiality reflects the weighty privacy expectations that flow from such a promise. Confidentiality is at the very core of the privacy interests in "the individual's control of information concerning his * * * person" (*Reporters Committee*, 489 U.S. at 763) and "in keeping personal facts away from the public eye" (*id.* at 769).

Contrary to the suggestion of amici ACLU (Br. 10), the fact that friends or neighbors knew of some of the interviews does not diminish the justifiable privacy interests of the interviewees. See *Reporters Committee*, 489 U.S. at 762 (privacy exemption applicable even though the "events summarized in a rap sheet have been previously disclosed to the public"); *Department of State* v. *Washington Post Co.*, 456 U.S. at 602-603 n.5 (privacy exemption applicable to publicly available, but scattered, citizenship records). A confidential interview conducted in Haiti is a matter of far more practical obscurity than the fact of an arrest or conviction in the United States. Unlike the information contained in the rap sheets in *Reporters Committee*, the facts recited in the interview reports have never been made public in a way that

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event, the State Department has made a sufficient showing to establish the appropriateness of confidentiality in this case.

It is also worth noting that two of the three members of the *Critical Mass* panel concurred separately to note their view that the result and analysis in that case would be different under the "straightforward language" and "common sense meaning of exemption four." 931 F.2d at 947-948 (Randolph, J., concurring, joined by Williams, J.). The concurring judges joined their remaining colleague's opinion for the court because they viewed themselves as bound by prior circuit precedent which "fabricated, out of whole cloth" and with "no legitimate basis" (*ibid.*) the requirement for which amici cite *Critical Mass* and which amici would fabricate under Exemption 6 as well.

could identify the subjects.[10] The ACLU's contention that information "previously disclosed" can no longer be private represents a "cramped notion of personal privacy" (*Reporters Committee*, 489 U.S. at 763) that has been expressly rejected by this Court. *Id.* at 762; see also *id.* at 762 n.15.

3. Disclosure of the identities of the interviewees would effect an immediate, material invasion of their personal privacy. This Court has never suggested, as respondents mistakenly contend (Resp. Br. 22), that disclosure of the names of individuals in specific government records presents only a speculative or hypothetical harm to this interest in privacy. To the contrary, the Court has observed that "the consequences of exposure of identity can admittedly be severe." *Department of the Air Force* v. *Rose*, 425 U.S. 352, 381 (1976).[11] The deletion of the cadets' names and "other

[10] Moreover, unlike the persons whose names are shown on rap sheets, the Haitian interviewees had the right not to contribute any of the information being sought by the government. The privacy interests in this case are thus even more substantial than those in *Reporters Committee*.

[11] *Arieff* v. *Department of the Navy*, 712 F.2d 1462 (D.C. Cir. 1983), upon which respondents seek to rely (Resp. Br. 14, 17, 22 n.21, 26, 35), is inapposite. The requester in that case sought copies of "all records concerning releases of any prescription drugs" from the Office of Attending Physician to the United States Congress. 712 F.2d at 1465. Disclosure was resisted due to a concern that it would be possible to associate specific users with specific diseases. The court concluded that the feared identification in *Arieff*, where no names or other identifying descriptions were sought, raised only a "mere possibility" of identification. *Id.* at 1467. The *Arieff* court observed that speculation by the public about who might have ingested the drugs prescribed by the OAP was "*a secondary effect*" which was "not the sort of invasion of privacy that can support an Exemption 6 claim." *Id.* at 1468. In the present case, by contrast, respondents seek the *names* of the interviewees. No "secondary effect" or speculation would be necessary to establish identification if the names are themselves disclosed.

identifying information" from the honor code reports in *Rose* was necessary specifically "in order to safeguard this privacy interest." *Reporters Committee*, 489 U.S. at 769. See also *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d at 878.

II. THERE IS NO PUBLIC INTEREST IN DISCLOSURE TO WARRANT THE INVASIONS OF PERSONAL PRIVACY

In our initial brief (Pet. Br. 20-27), we asked the Court to reject the "derivative use" rationale that had been applied by the court of appeals. We pointed out that reliance upon a requester's proposed further research plans to establish a public interest in disclosure would provide a means in almost every FOIA case to circumvent the protection of privacy for individuals, would be inconsistent with the "workable formula" for the protection of privacy interests established by this Court in *Reporters Committee*, and would conflict with the Act's mandate that all FOIA requesters be treated equally. Respondents and their *amici* have not seriously refuted any of these arguments. We respond, however, to a few of their specific contentions.

1. In a relatively early FOIA decision, *Getman* v. *NLRB*, 450 F.2d 670, 677 n.24 (D.C. Cir. 1971), the court erroneously relied upon the requesters' motives and resources in ordering disclosure. The decisions collected by respondents (Resp. Br. 26-27 & n.28) follow *Getman*, or its logic. All but one of these decisions was issued before *Reporters Committee*. The single exception is currently on appeal. *Painting Industry of Hawaii Market Recovery Fund* v. *United States Dep't of the Air Force*, 751 F. Supp. 1410 (D. Haw. 1990), appeal pending, No. 90-16659 (9th Cir.). Following this Court's decision in *Reporters Committee*, however, public interest arguments that rely upon proposed derivative uses of private information have consistently

been rejected or discounted by the courts of appeals. See *National Ass'n of Retired Federal Employees* v. *Horner*, *supra*; *FLRA* v. *Department of the Treasury*, 884 F.2d 1446 (D.C. Cir. 1989), certs. denied, 493 U.S. 1055 (1990); *Hopkins* v. *HUD*, 929 F.2d 81 (2d Cir. 1991); *Painting & Drywall Work Preservation Fund, Inc.* v. *HUD*, No. 88-5076 (D.C. Cir. June 21, 1991).

2. Petitioner has not requested this Court to impose a "categorical anonymity rule" (Lawyers Comm. for Human Rights Amici Br. 7). It is conceivable that in some particular case there would be an intrinsic public interest in disclosure of the identity of a specific person, where the identification itself would "shed * * * light on the conduct of [a] Government agency or official" (*Reporters Committee*, 489 U.S. at 773). For example, while rejecting the request for disclosure of rap sheets in *Reporters Committee*, the Court indicated that a request for records relating to contracts between the government and a specific, named individual would be appropriate. *Id.* at 774. If such records included the names of public officials who influenced the contract process, there could be a direct public interest in disclosure of those identities.

But that rationale would not apply in this case. There is no claim here that the names of the Haitian interviewees would themselves shed any light on the government's conduct. Instead, respondents ask for disclosure of the identities of the interviewees for use as "leads" to "help" shed light on official conduct (Resp. Br. 30). Such a formulation, we submit, places the respondents' quest for disclosure well outside the bounds permitted by this Court. Because the names of the interviewees are themselves "irrelevant to the public's understanding of the Government's operation" (*Reporters Committee*, 489 U.S. at 766 n.18), the redaction of their names from the records produced by the

government is "unquestionably appropriate" in order to protect their privacy (*id.* at 773).

The loose and open-ended formulation proposed by respondents for the Exemption 6 balancing process would strip the judicial inquiry of any meaningful content. Even the least imaginative and resourceful requester could explain how the identities of welfare recipients might "help" lead to information on the efficiency or fairness of the welfare system, or how the identities of taxpayers could "help" lead to discovery of fraud or corruption. Congress clearly intended, however, that disclosures of such private information not be allowed. See S. Rep. No. 813, *supra*, at 7; H.R. Rep. No. 1497, 89th Cong., 2d Sess. 8 (1966).[12]

A test that focuses on whether information might, after further derivative research, "help" to shed light on government conduct would permit attenuated and speculative claims to override the privacy protections established in the FOIA.[13] It would provide no meaningful instruction to the

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[12] Lawrence Speiser, Director of the Washington Office of the American Civil Liberties Union, supported this restriction on the disclosure of private information in comments delivered at the House subcommittee hearings on the Act. See *Federal Public Records Law: Hearings on H.R. 5012 Before Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess. 190 (1965). He stated that the ACLU's view (at that time) was that Exemption 6 should be interpreted to mean "that the individual directly involved would be able to obtain information concerning his case but other individuals could not." *Ibid.*

[13] If the disclosure sought by respondents were permitted, it would unquestionably have adverse repercussions on the ability of the United States to monitor and enforce human rights around the world. Once persons abroad learn that the United States cannot be relied on for the protection of confidential information, they would "close up like a clam." *CIA* v. *Sims*, 471 U.S. 159, 175 (1985). This impact, which is palpably *contrary* to the public interest, neutralizes any conceivable weight that might attach to respondents' proposed derivative use of the information.

agencies and the courts, depriving them of the "workable" rules that Congress intended. See *Reporters Committee*, 489 U.S. at 779; *FTC* v. *Grolier Inc.*, 462 U.S. 19, 27-28 (1983). See also *Harbolt* v. *Department of State*, 616 F.2d 772, 775 (5th Cir.), cert. denied, 449 U.S. 856 (1980). It would also suffer from the quite serious defect that it would allow disclosure to turn on the unique motivations and resources of the requester, contrary to this Court's specific admonition that "whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made." *Reporters Committee*, 489 U.S. at 771; see also *FBI* v. *Abramson*, 456 U.S. 615 (1982); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 221 (1978).[14] As one of the FOIA's major congressional advocates explained:

> Government information should be available to "any person" for a very good reason—it is the character of the information that determines its availability, not the character of the person requesting it.

Federal Public Records Law: Hearings on H.R. 5012 Before Subcomm. of the House Comm. on Government Operations, 89th Cong., 1st Sess. 174 (1965) (statement of Rep. Fascell).

3. The ACLU suggests (Br. 12) that the disclosure sought in this case could be said to satisfy the requirement of *Reporters Committee* that the names to be disclosed have a direct or intrinsic informational value concerning the

[14] Representatives of the former Haitian government, or the *tonton macoute* (its unofficial enforcers), could have made the same FOIA request as respondents. This could be done either overtly or under the contrived name of a public interest group (or an individual) claiming a desire to help the safe relocation of Haitians. There is no practical way to determine whether a requester actually harbors doubts regarding the accuracy of the State Department's interview reports or is actually motivated by some other personal or commercial interest. But this impractical search for individual motivations (or research objectives) as a justification for disclosure is the heart of the "derivative use" concept.

operation of the government on the theory that it would directly tell the public *who* the State Department had consulted about conditions in Haiti. This argument lacks even a superficial logic. Every government record that mentions individuals by name could be said to disclose who the government has obtained information from or about. But, like the names of the Air Force cadets that were withheld in *Rose*, this kind of personal information itself tells us nothing about the conduct of government.[15]

Respondents offer the more particularized claim that they would use the information they hope ultimately to derive from the disclosure of this private information in asylum proceedings (Resp. Br. 35). It is well established, however, that the particularized litigation desires of a FOIA requester cannot be a basis for disclosure. "The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975). Respondents' "rights under the Act are neither increased nor decreased" by their interest in any ongoing administrative or judicial proceedings. *Ibid.* See also *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 20 (1974).

4. Citing three dissenting opinions, amici ANPA et al. suggest that the Court should "acknowledge" the First Amendment "implications" of this case (Br. 14). There is, however, no First Amendment or other constitutional right of the press, or other members of the public, to Executive Branch information. *Houchins* v. *KQED, Inc.*, 438 U.S.

[15] The ACLU argument is ultimately a plea that *Reporters Committee* was wrongly decided. Indeed, the ACLU argues (Br. 14 n.4) that "the journalists [in *Reporters Committee*] failed to litigate the most relevant public interest—shedding light on the FBI's conduct regarding the maintenance of rap sheets." It cannot reasonably be urged at this point, however, that such contrived arguments would have altered the outcome of *Reporters Committee*.

1, 11 (1978). This is not to deny the vital importance of an informed citizenry to the functioning of our democratic society. The State Department has honored this public interest by releasing reports that provide extensive detail on the agency's activities and operations in Haiti. The only information that was redacted from these reports was the names of the interviewees who cooperated in assembling that very information under promises of confidentiality. In accordance with the FOIA's dictates, the agency's redaction of personal information from these reports was narrowly tailored to protect the "equally important" (S. Rep. No. 813, *supra*, at 3) statutory right of privacy from clearly unwarranted intrusion.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF STATE,
Petitioner

v.

MICHAEL D. RAY, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; GANNETT CO., INC.; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; AMERICAN SOCIETY OF NEWSPAPER EDITORS; SOCIETY OF PROFESSIONAL JOURNALISTS; NATIONAL ASSOCIATION OF BROADCASTERS; NEWSLETTER ASSOCIATION; AND THE NEW YORK TIMES COMPANY IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether FOIA Exemption 6, which allows agencies to withhold information only when disclosure "would constitute a clearly unwarranted invasion of personal privacy," creates a categorical rule of anonymity permitting withholding of information which could identify Haitian citizens interviewed by the State Department.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-747

UNITED STATES DEPARTMENT OF STATE,
Petitioner

v.

MICHAEL D. RAY, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; GANNETT CO., INC.; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; AMERICAN SOCIETY OF NEWSPAPER EDITORS; SOCIETY OF PROFESSIONAL JOURNALISTS; NATIONAL ASSOCIATION OF BROADCASTERS; NEWSLETTER ASSOCIATION; AND THE NEW YORK TIMES COMPANY IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

Amici are media organizations or journalists' associations. They depend on the Freedom of Information Act ("FOIA") to obtain primary information from federal agencies and report about government activity to their readers. Journalistic principles demand that government information not be accepted at face value; journalists therefore use information released by government agencies to get an independent viewpoint. Credibility, impact

and human interest demand that stories about individuals not be cloaked in anonymity; journalists reporting on government activities therefore seek the identities of those affected. In this case, the government seeks a rule which, in the guise of defining "public interest" under FOIA's privacy exemptions, denies the applicability of those key journalistic imperatives to FOIA. Therefore, because of the importance of the "public interest" and "derivative use" issues involved in this case, amici offer their perspective gained from 25 years of FOIA experience.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION (ANPA) is a non-profit trade association representing approximately 1,400 member newspapers. Membership constitutes about 90 percent of the total U.S. daily and Sunday newspaper circulation, and a substantial portion of the non-daily newspaper circulation in the United States. ANPA members depend on FOIA to gather the news and ensure the free flow of information to their readers.

GANNETT CO., INC., publishes 82 daily and a variety of non-daily publications and operates ten television and fifteen radio stations. Total circulation of the daily newspapers amounts to over 6.3 million, including USA TODAY, which circulates an average of 1,863,436 newspapers daily. Gannett publications and broadcasts reach an average total audience of over 22 million people across the nation each week. Gannett news organizations, including the Gannett News Service, rely on extensive use of the FOIA and state equivalents to develop story leads, obtain information, and gather the news.

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS is a voluntary association of reporters and news editors from the print and broadcast media. The Reporters Committee, founded in 1970, is governed by a steering committee of news reporters from around the country. Its legal defense and research efforts are

devoted to the protection of First Amendment values and freedom of information interests of the news media.

The Reporters Committee has provided information, representation, legal guidance and research in virtually every significant federal and state appellate press freedom case since 1972. As a special project, the Reporters Committee sponsors the Freedom of Information Service Center, which advises reporters on issues of access to government records and proceedings. The FOI Service Center daily handles calls from reporters and editors seeking advice in their attempt to use FOI laws to inform the public about what their government is up to.

AMERICAN SOCIETY OF NEWSPAPER EDITORS is a nationwide professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States.

NATIONAL ASSOCIATION OF BROADCASTERS (NAB) organized in 1922, is a non-profit incorporated trade association that serves and represents America's radio and television stations and all the major networks. NAB's members cover, produce and broadcast the news to the American people, often utilizing FOIA in the process. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public concern.

NEWSLETTER ASSOCIATION represents 850 publishers of newsletters and specialized information services. The association's members regularly depend on information contained in agency records to educate their readers regarding vital issues of public policy. Many of these issues, while initially reported only in the specialized press, ultimately become matters of widespread public concern and subjects of intense coverage in the mass media.

THE NEW YORK TIMES COMPANY publishes 33 newspapers, including *The New York Times*, a daily newspaper with national circulation of over 1.2 million daily and Sunday circulation of over 1.75 million. The Company also publishes 17 magazines and owns five television and two radio stations.

THE SOCIETY OF PROFESSIONAL JOURNALISTS is a voluntary, non-profit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.

Amici believes that the Freedom of Information Act must be interpreted in a manner that encourages the free flow of information from government to its citizens. This requires a narrow interpretation of any exemptions and particularly requires rejection of categorical nondisclosure rules. Because they believe Petitioner's argument for reversal rests impermissibly on a categorical rule of nondisclosure alien to FOIA's spirit and purpose, *amici* urge affirmance of the court of appeals' decision.

SUMMARY OF ARGUMENT

The Department argues for an interpretation of FOIA Exemption 6 (5 U.S.C. § 552(b)(6)) which, if accepted, would represent a revolutionary judicial revision of the FOIA. By urging what amounts to a categorical rule of anonymity in Exemption 6 cases, the Department would have the Court nullify the careful balance between privacy and the public interest that Congress created. Such an outcome finds no support in the statute and would be an unwarranted extension of the Court's decision in *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) ("*Reporters Committee*").

Amici believe that the Department's categorical anonymity rule would severely undercut the value of FOIA for journalists, who serve as the public's primary agents

in determining "what their government is up to." Monitoring *who* the government's actions are affecting often can be as important as knowing what it is doing. A categorical anonymity rule would conceal whether agencies are carrying out their responsibilities effectively or evenhandedly. It would also block journalists' access to important sources of information, making it impossible to follow up on promising leads suggested by the information. Media requesters would then have little choice but to accept an agency's sanitized version of how its operations affect citizens.

Amici therefore urge the Court to reject any new Exemption 6 analysis in favor of reiterating the traditional balancing test between privacy and the public interest. The Court should also reject any narrow interpretation of public interest which is limited to the "intrinsic value" of government information. No public interest test should ignore the potential uses of information gleaned from government files. Journalists' role is to question, analyze and follow-up on the information that they gain from government sources, not accept it at face value. Many important chronicles of government inaction and folly developed from using FOIA as a starting point for further investigative reporting. The public interest under FOIA Exemption 6, therefore, must encompass the concept of "derivative use."

FOIA balancing should also recognize that privacy interests can range from the trivial to the substantial and that it is the courts' role to weigh, in particular cases, the strength of the privacy interests asserted. A categorical anonymity rule, which invariably exalts privacy interests, is simply not consistent with FOIA's intent to promote disclosure while prohibiting only "clearly unwarranted" invasions of privacy.

ARGUMENT

I. THE GOVERNMENT IMPROPERLY INTERPRETS EXEMPTION 6 AND *REPORTERS COMMITTEE* TO ALLOW A CATEGORICAL ANONYMITY RULE

In its brief, Petitioner, the United States Department of State ("Department"), presents a revisionist view of FOIA far different than Congress intended. According to the Department's new construct, "responsible disclosure" under the FOIA requires nothing less than the creation of a categorical anonymity rule which would allow withholding of personally identifiable information in all circumstances:

> The "workable formula" that Congress intended to apply in providing for the fullest responsible disclosure of government records is thus achieved by permitting the release of the information compiled by the government, *so long as anonymity is maintained.*

Petitioner's Brief at 16 (emphasis added). The Department relies primarily on this proposed anonymity rule in urging reversal. Although it admits that its interviews with Haitian citizens should be disclosed, the Department nonetheless argues that FOIA requires categorical withholding of any information that could identify those interviewed. The Department's reason for doing so does not rely on balancing privacy interests and the public interest in disclosure. Rather, it relies on a new interpretation of FOIA Exemption 6 that would, *in all circumstances*, deny a public interest in information which could identify individuals.

In advancing its new theory of FOIA Exemption 6, the Department invites this Court to misread and expand *Reporters Committee* in a manner that would eliminate balancing the public interest in identifying individuals affected by government action. This allows the Department to argue that FOIA invariably endorses anonymity:

> The deletion of personal identification information from government reports is thus "unquestionably appropriate because the names of the particular" persons involved are "irrelevant to the inquiry into the way the" government administers its responsibilities . . . "disclosure of records concerning private citizens identifiable by name is not what the framers of the FOIA had in mind."

Petitioner's Brief at 19 (citations omitted).

The Department's proposed categorical anonymity rule would permit agencies to withhold personal identifying information from disclosed government records in all cases where the agency could say that a privacy interest was implicated. For example, the rule would exempt names of recipients of federal grants or loans, even if they were made to large campaign contributors or the agency officers themselves. Because, under the Department's theory, the identity of the individuals given public benefits is always "irrelevant" to the public's understanding of government operations, Petitioner's Brief at 19, this information would invariably be withheld under the Department's anonymity rule. The same rule would exempt all subjects of federal enforcement actions, pending or not. *Id.* Absent explicit statutory authorization mandating disclosure, the Department's proposed rule would permit withholding the identities of individuals who hold government contracts. Stretched to its Kafkaesque limits, the Department's reasoning would foster a government of faceless bureaucrats making decisions about anonymous subjects.

Congress never intended to create such a broad, *per se* anonymity rule. In inviting this Court to do so judicially, the Department wrenches language from *Reporters Committee* out of context and extends its holding far beyond the circumstances of that case.

A. *Reporters Committee* Provides No Support For A Categorical Anonymity Rule

Reporters Committee concerned "rap sheet" information about individuals collected and stored in the FBI's

huge computerized data collection.[1] 489 U.S. at 751. The FBI did not create the rap sheet information. It was, instead, part of a centralized aggregation of state and local information collected for law-enforcement purposes. The FBI refused to release any part of the information. In these circumstances, the Court concluded that it would not advance FOIA's purposes to disclose the individual-specific information sought in *Reporters Committee*, since that information had no connection with federal government activity other than the fact that the government collected it. *See* 489 U.S. at 773.

Concluding that FOIA's oversight function would not be advanced by public access, *Reporters Committee* held that a categorical nondisclosure rule could apply to collections of personal information held in government law enforcement databanks. Although it acknowledged that FOIA exemption 7(C) (5 U.S.C. § 552(b)(7)(C)) generally contemplates particularized balancing, the Court concluded that where the FOIA request merely involved law enforcement information about individuals held by the government in its data storehouse role, these specific circumstances militated in favor of a categorical nondisclosure rule.[2] 489 U.S. at 779-80. Fundamental to the Court's holding was the belief that, in this special situation, privacy concerns peaked and the countervailing interests favoring disclosure diminished to insignificance. 489 U.S. at 780.

This case involves far different circumstances. Respondent seeks Department summaries of interviews with Haitians who were turned back attempting to flee to the

[1] That data collection contained rap sheets on over 24 million persons. 489 U.S. at 751.

[2] The Court was also heavily influenced by the 1986 amendments to Exemption 7(C) and Congress' broadening of the law enforcement exemption to "give the Government greater flexibility in responding to FOIA requests for law enforcement records or information." 489 U.S. at 777 n.22.

United States. As the Department acknowledges, this information is within even its notion of the public interest, since the information can aid the public in overseeing the Department's enforcement of the immigration laws. Petitioner's Brief at 20. The Department's sole argument pertains to whether information identifying the interviewees should be redacted or not, an issue that raises different concerns than those present in *Reporters Committee*.

Despite these different circumstances, the Department would have this Court extend its *Reporters Committee* holding to create a far-reaching, categorical anonymity rule for all situations implicating Exemption 6. Such a rule is unworkable, for it has no limiting principle and allows for no check on the overzealous redacter. This case and the typical Exemption 6 case involve a dispute where the government releases some information, but claims a right to withhold additional personal identifying information on privacy grounds. The Department does not disclose, however, how it will make bright-line judgments about withholding "other information" that may both reveal government operations and potentially serve to identify individuals. *See Department of the Air Force v. Rose*, 425 U.S. 352, 380-81 (1976). Congress recognized that agencies have a built-in bias to withhold information and designed FOIA to combat that tendency by creating a presumption of disclosure, a limited list of exemptions, and judicial authority to oversee agencies' adherence to this statutory scheme. *Id.* at 361. The Department's proposed categorical rule goes against the grain of FOIA's intent to give the judiciary meaningful oversight over agencies' decisions to withhold information.

Amici believe that it can never be appropriate to create a categorical rule for determining how much of that information should be released or not. The particular circumstances will determine both the nature of the public interest in disclosure and the strength of any privacy

interest involved. This is what traditional Exemption 6 balancing is all about.

Along with misreading *Reporters Committee*[3] and insulating redaction decisions from effective oversight, the Department's proposed rule ignores the crucial differences between FOIA Exemptions 6 and 7. It also disregards Congressional instructions to fashion a balance which neither abrogates nor substantially subordinates either privacy or the public interest. Finally, it runs counter to this court's rejection of a categorical rule in

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[3] Petitioner does so principally by taking language out of context and ignoring the qualifications *Reporters Committee* places on some of its statements about personally identifiable information. For example, the Department relies on footnote 18 of *Reporters Committee* in fashioning its argument for a categorical anonymity rule. *See* Petitioner's Brief at 18-19 n.8, quoting 489 U.S. at 766 n.18, which in turn quotes legislative history. Note 18 and the quoted legislative history, however, contain an important qualification to Congress' general statement about the public not needing to know the identities of individuals affected by government decisionmaking —"*if the identification has no bearing or effect on the general public.*" It is precisely this qualification which precludes any categorical rule. There are numerous situations where identification of individuals will have an important effect on the general public and its oversight of government. See pages 17-23, *infra*. Moreover, contrary to the Department's assertion (Petitioner's Brief at 16-17, 20), FOIA's redaction provision (5 U.S.C. 552(b)) and *Department of the Air Force v. Rose*, 425 U.S. 352 (1982), similarly provide no support for a categorical rule of anonymity. The result in *Rose* came about because of the particular circumstances involved, not as part of an intent to create a general rule of anonymity. *Rose* recognizes, by its approving citation to remarks of the principal sponsor of the FOIA amendment which became 5 U.S.C. § 552(b), that redaction to ensure anonymity should only occur when the strength of privacy concerns warrant it:

> For example, deletion of names and identifying characteristics of individuals *would in some cases* serve the underlying purposes of exemption 6 . . .

Rose, 424 U.S. at 375, quoting 120 Cong. Rec. 17018 (1974) (remarks of Sen. Kennedy (emphasis added).

other cases involving restrictions on the free flow of information.

B. Exemption 6 Requires An Exacting Standard In Order To Deny Disclosure

Reporters Committee involved an interpretation of FOIA Exemption 7(C), which pertains to law enforcement records. This case involves Exemption 6, the general privacy exemption under FOIA. Although several courts have accepted that *Reporters Committee* has some applicability to FOIA Exemption 6,[4] the key differences between the exemptions requires that this Court not apply *Reporters Committee*'s Exemption 7(C) holding to Exemption 6 cases, let alone extend it as the Department would have this Court do. Exemption 6 creates a different standard than Exemption 7(C) in that the privacy interest threatened by disclosure must be greater for Exemption 6 to apply. Unlike Exemption 7(C), Exemption 6 requires that the invasion of privacy be "*clearly* unwarranted." Exemption 7(C) omits the adverb "clearly." Moreover, Section 7(C) requires only a showing that disclosure "could reasonably be expected" to constitute an invasion of privacy, whereas Exemption 6 refers to disclosures that "would constitute" an invasion. 489 U.S. at 767-68.

This Court has previously recognized the distinctions between Exemption 6 and Exemption 7(C), noting that the "clearly unwarranted" language was a considered decision of Congress to accord privacy interests less weight under Exemption 6 than under Exemption 7(C). *Reporters Committee*, 489 U.S. at 756; *Department of the Air Force v. Rose*, 425 U.S. at 379 n.16. *See also*

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[4] *See, e.g., Hopkins v. HUD*, 929 F.2d 81 (2d Cir. 1991); *FLRA v. U.S. Dep't of the Treasury*, 884 F.2d 1446, 1451-1452 (D.C. Cir. 1989), cert. denied, 110 S.Ct. 863 (1990); *National Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 989), cert. denied, 110 S.Ct. 1805 (1990).

Fund for Constitutional Government v. Nat'l Archives and Records Service, 656 F.2d 856, 862 (D.C. Cir. 1981); Note, *Applying the Freedom of Information Act's Privacy Exemption to Requests for Lists of Names and Addresses*, 58 Fordham Univ. Law Rev. 1033, 1044, n.65 (1990) (citing legislative history rejecting attempts to eliminate "clearly unwarranted" language). Thus, the standard for assessing a threatened invasion of privacy under Exemption 6 is different than that under Exemption 7(C). *Reporters Committee*, 489 U.S. at 756. Amici believe that it would be fundamentally wrong to give privacy interests the same weight under Exemption 6 as they are given under Exemption 7(C), let alone create a categorical rule that allows asserted privacy interests always to trump the interests in disclosure. Congress intended no such result.

C. Congress Intended Particularized Balancing

Instead, Congress intended that courts balance privacy interests and the public interest to be gained from disclosure. As this Court recognized in *Department of the Air Force v. Rose*, 425 U.S. at 372-73, Exemption 6 requires balancing:

> The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public right to government information.

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). *See also* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966). Congress understood that balancing would not always be easy or convenient, yet nonetheless believed that it would more properly advance FOIA's purposes than would some categorical rule:

> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.

S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Similarly, the House emphasized the values it was furthering by requiring balancing:

> It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. *The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government.*

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (emphasis added). Congress' intent is clear. Neither privacy nor public interest should be subordinated to the other, which indicates a strong disfavoring of any categorical rule. Equally important, Congress emphasized its preference for disclosure and cautioned against a rule that would foster "indiscriminate secrecy."

D. First Amendment Access Cases Also Favor A Balance Between Competing Interests

By insisting on anonymity in all circumstances, the Department's proposed rule would foster the very "indiscriminate secrecy" that Congress sought to avoid. It also runs counter to bedrock democratic principles, which depend upon openness and the free flow of information as important limits on government. This dependence necessarily includes openness about how government affects individual citizens. "Without publicity, all other checks are insufficient; in comparison of publicity, all other checks are of small account." *In re Oliver*, 333 U.S. 257, 271 (1948).

This Court's First Amendment jurisprudence, emphasizing the relationship between democratic govern-

ment and access to information, demonstrates the defects in the Department's proposed categorical anonymity rule. Although explicit recognition of a constitutional right of access to Executive Branch information is not necessary to decide this case, this Court can acknowledge the First Amendment implications of creating categorical rules that would restrict disclosure of government information. *See Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 18 (1986) (Stevens, J., dissenting) (a proper construction of First Amendment embraces right of access to government information); *Houchins v. KQED, Inc.*, 438 U.S. 1, 30-32 (1978) (Stevens, J., dissenting) (First Amendment protects acquisition of information from government); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting) (First Amendment concerns encompass the receipt of information as well as right of free expression).

The Court should also decide this case with full recognition of the close correlation between FOIA's policies and those of the First Amendment. Both FOIA and the First Amendment have as their basic purpose ensuring the informed citizenry vital to the functioning of a democratic society. *FBI v. Abramson*, 456 U.S. 615, 621 (1982) (FOIA); T. Emerson, *Toward A General Theory of the First Amendment* 112 (1963) (successful operation of a democratic society depends upon members of society having access to the information necessary for making decisions). The Department's proposed categorical rule will negatively impact those purposes, creating a irrebutable presumption of nondisclosure rather than disclosure.

The Court has repeatedly rejected this course in the judicial access area, holding that categorical privacy rules cannot overcome the principle of openness. In *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), the Court recognized the importance of jurors' privacy rights, but struck down a trial court's decision which closed voir dire proceedings to the public and press based

upon a generalized notion that those privacy rights overcame the value of openness:

> The privacy interests of such a prospective juror must be balanced against the historical values we have discussed and the need for openness of the process.

464 U.S. at 512. Similarly, in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Court discussed the privacy rights of child victims of sexual crimes. It held those interests could not justify a categorical rule denying access to criminal proceedings:

> But as compelling as that interest is, it does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of that interest.

457 U.S. at 607-08. Finally, in *Waller v. Georgia*, 467 U.S. 39 (1984), the Court used a Sixth Amendment rationale to strike down another impermissibly broad rule of secrecy premised on privacy notions. The Court's clear conclusion was that particularized examination of all factors was a constitutional requirement:

> Here, however, the State's proffer was not specific as to whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes. As a result, the trial court's findings were broad and general, and did not purport to justify closure of the entire hearing.

467 U.S. at 48.

The Department's proposed categorical anonymity rule suffers from the same fatal flaw as the broad rules of secrecy struck down in the judicial access cases.[5] Without

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[5] *Cf. also Nixon v. Administrator of General Services*, 433 U.S. 425, 458 (1977) (Merits of privacy invasion claim should not be considered in the abstract; any privacy intrusion must be weighed against public interest).

particularized consideration of the individual circumstances, the proposed categorical anonymity rule would invariably restrict the free flow of information based upon generalized privacy concepts. The Court has rejected this course in the judicial access area and should do the same here, especially in light of FOIA's strong pro-disclosure bias. Constitutional principles, as well as Congress' intent, compel this result.

II. DERIVATIVE USE OF INFORMATION IS NOT PROHIBITED BY FOIA

A. *Reporters Committee* Permits Analyzing The Use To Which Information Can Be Put

The second flaw in the Department's argument is its assertion that the potential uses of information have no relevancy under FOIA. Only by viewing names in isolation and then arguing FOIA allows no "derivative use" can the Department maintain that there is never a public interest in the disclosure of information about individuals. This "no-derivative use" premise is crucial to the Department's argument for a categorical anonymity rule, for it enables the Department to avoid any balancing between privacy and the public interest.

By relying on the vague notion that FOIA applies only to information that "directly" sheds light on government operations, Petitioner's Brief at 23, the Department manufactures a limitation that finds no textual or structural support in FOIA. Moreover, the Department's position cannot be sustained as a practical principle because it disregards the many subsequent uses of information which can shed light on government operations. "Derivative use" is a hallmark of good journalism, as well as a critical tool in assessing "what the government is up to." For this reason, this Court should not prohibit "derivative use" unless Congressional intent is clear or FOIA's policies demand the limitation the Department seeks. There is no such support for the Department's proposed

limitation. Rather, the only basis for the Department's argument rests upon another misinterpretation of *Reporters Committee*.

Reporters Committee stands for the proposition that information must reveal government conduct in order to meet FOIA's public interest standard. 489 U.S. at 774-775. Contrary to the Department's assertion, *Reporters Committee* does not slam the door on the possibility that personally identifiable information *may* satisfy the public interest standard. Rather, satisfaction of that standard depends "on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny.'" 489 U.S. at 772. When personally identifiable information has a relationship to overseeing government operations and will shed light on "what government is up to," a legitimate public interest exists and FOIA compels a court to balance that interest against the asserted privacy interest. *Id.* This is the conclusion properly drawn by the court of appeals, as well as by other courts which have faced the issue after *Reporters Committee*. *See Ray v. U.S. Dep't of Justice*, 908 F.2d 1549, 1556 (11th Cir. 1990); *Hopkins v. HUD*, 929 F.2d 81, 86 (2d Cir. 1991); *Painting Industry of Hawaii v. U.S. Dep't of the Air Force*, 751 F. Supp. 1410, 1417 (D. Haw.), *reconsideration denied*, 756 F. Supp. 452 (D. Haw. 1990).

This conclusion necessarily follows from government's ability to affect those it governs. It does so in many ways—as adjudicator, as contractor, as dispenser of benefits, as employer and as licensor. In all of those roles, government agencies must deal with individuals according to statutory standards. Agencies, furthermore, owe a general duty of evenhandedness. Monitoring that performance is an important public interest, and identification of individuals, or information about individuals, is critical to that role. Articles from *amici*'s members have

evaluated agency practices to determine whether they were engaged in unfair discrimination, have evaluated government operations to determine whether political favoritism is involved, and have generally assessed the impact of government decisions on the individuals directly affected by them. All these articles depended on personally identifiable information which would be withheld as "irrelevant" under the Department's interpretation of the public interest. There can be no doubt that this use of personally identifiable information can shed light on important governmental operations, for it enables the public to determine whether an agency is fulfilling its statutory mandate and whether it is acting fairly and nondiscriminatorily. *See IBEW Local Union No. 5 v. HUD*, 852 F.2d 87, 90-91 (2d Cir. 1988); *United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 598 v. Department of the Army*, 841 F.2d 1459 (9th Cir. 1988); *Heights Community Congress v. Veterans Administration*, 732 F.2d 526, 530 (6th Cir. 1984); *IBEW, Local 41 v. HUD*, 593 F. Supp. 542 (D.D.C. 1984), *aff'd*, 763 F.2d 435 (D.C. Cir. 1985); *Painting Industry of Hawaii v. U.S. Dep't of the Air Force*, 751 F. Supp. 1410, 1417 (D. Haw.), *reconsideration denied*, 756 F. Supp. 452 (D. Haw. 1990).

Similar results can be obtained by other subsequent uses of information disclosed through FOIA. FOIA requesters must be free to analyze data obtained through FOIA, compare it with other publicly available information, or use it as a basis for asking pointed questions of government officials. The information used in this manner would not "directly" shed light on governmental operations, nor would it do so "in and of itself." All of these are arguably "derivative uses" of government information that the Department would now claim are outside FOIA to the extent they involve personally identifiable information, yet all could lead to important disclosures about government operations.

Nonetheless, the Department urges a bright-line test, premised on the conclusion that *Reporters Committee* precludes inquiry into the requester's intended use of any information. The Department's premise confuses "use" with a FOIA requester's "purpose" and rests on a misapprehension of the FOIA precedents. Although the Department correctly states that a FOIA requester's identity and/or particular motivation for making the request are irrelevant, Petitioner's Brief at 25-26, this does not mean that the potential uses of the information cannot be considered in determining whether the disclosure casts light on governmental operations. On the contrary, *Reporters Committee* would permit consideration of the potential "subsequent uses" of the information. It denied disclosure of the FBI rap sheets precisely because the subsequent uses of the information could not shed light on the workings of government:

> In this case—and presumably in the typical case in which one private citizen is seeking information about another—*the requester does not intend to discover anything about the conduct of the agency . . .*

489 U.S. at 773 (emphasis added). *See also Halloran v. Veterans Administration*, 874 F.2d 315, 323 (5th Cir. 1989) (disclosure depends on the *information*'s relationship to the purpose of informing the citizenry about the activities of government).

If requested information must "show what the government is up to," considering how the information may be used is a legitimate and effective method of assessing the strength of the public interest involved. The only way to determine whether the public can "discover anything about the conduct of the agency" is through an analysis of the potential uses of the information. This analysis must be information-specific. It need not depend upon the identity of the requester or the requester's motivation in seeking the information. *Kurzon v. HHS*, 649 F.2d 65, 68 (1st Cir. 1981) (court must distinguish between im-

portance of subject matter of request and prospects of requester as standard bearer for public interest). Rather, it focuses on the information which is sought and the circumstances in each case. *See Reporters Committee for Freedom of the Press v. U.S. Dep't of Justice*, 831 F.2d 1124, 1129 (D.C. Cir. 1987) (Starr, J. dissenting on rehearing).

B. "Derivative Use" Of Information Is Vital To Journalists In Determining What Government Is Up To

The court of appeals recognized that the information contained in a government document can be crucial to uncovering governmental conduct, even if the requested information does not "directly" reveal the nature of that conduct. 908 F.2d at 1555. As long as the information can be used to reveal government conduct, it satisfies the threshold public interest standard under Exemption 6. 908 F.2d at 1555-56. This conclusion is a legitimate interpretation of FOIA and should be affirmed.

"Derivative use" is critical because the Department's proposed alternative, in the guise of fostering administrative convenience,[6] does too little to advance FOIA's central pro-disclosure purpose. Information released pursuant to a FOIA request may sometimes in and of itself reveal the full nature of government conduct. In far more cases, however, it will not. In those cases the information may be a necessary link to additional information, part of a larger puzzle where the pieces must be carefully searched out and assembled. The end product can be, and often is, the exposure of governmental action, ineffectiveness or misconduct which is unquestionably within the public's right to know. Yet, if the initial information

[6] The Department's argument against assessing potential uses of requested information depends in large part on the perceived administrative and judicial burdens inherent in particularized balancing. Petitioner's Brief at 26. Burdened or not, however, the Department and the courts are constrained to enforce FOIA's balancing requirement until Congress decides to change it.

is not released because it does not "directly" reveal governmental activity, the end result may never reach the public.

Amici have traditionally used public records to get the first puzzle parts, the key corner pieces, which are later supplemented with additional reporting and investigation. Investigative journalism's time-tested methodology involves following all leads and conducting follow-up interviews in an independent search for truth. Countless award-winning reports have used personally identifiable information in public documents as a springboard to uncover additional publicly available information, to direct questions to government officials, and to conduct follow-up interviews with the individuals affected. The resulting stories have ranged from those promoting a better public understanding of how government operates to exposés of unsatisfactory governmental conduct. These revelations of how government does or does not carry out its functions have furthered our system of self-government and resulted in public responses ranging from appreciation of government's successes to demands to have abuses remedied. They unquestionably serve FOIA's central purpose —to enable the public "to decide *for itself* whether government action is proper." *Washington Post Co. v. HHS*, 690 F.2d 252, 264 (D.C. Cir. 1982).

Below are merely a few examples of investigative journalism which have been substantially aided by "derivative use" of personally identifiable information obtained through freedom of information laws or other public sources:

• A deeply-compelling Pulitzer Prize-winning series uncovered the deaths of fifty-one children and the abuse of countless others while under the "protection" of Georgia's child welfare system. The stories documented the utter failure of the system to keep track of the children under its care, many of whom lived in dangerous and appalling

conditions and suffered preventable deaths and serious physical and emotional damage. Ironically, reporter Jane Hansen found that long-standing confidentiality laws, ostensibly designed to protect the privacy of children, forbade the release of information—even about dead children —which could have saved them or others from brutal beatings and death. As a direct result of the public outcry following this series, Georgia appropriated several million dollars to reform its child welfare system, inquiries by prospective foster parents quadrupled, and volunteerism increased at an overtaxed charity hospital caring for abused and drug-addicted babies and children. *See* Hansen, *Suffer the Children*, Atlanta Journal-Constitution, June 4-10, 1989.

• Another Pulitzer Prize-winning report exposed physicians in Indiana who had been found liable for malpractice several times, yet continued to practice medicine and were never disciplined by the responsible state agency. The repeated malpractice of these doctors resulted in dead as well as crippled and deformed patients who, due to Indiana's laws, were compensated for only a fraction of their subsequent medical costs. *See* Hallinan and Headden, *A Case of Neglect: Medical Malpractice in Indiana*, The Indianapolis Star, June 24-26, 1990 at 1.

• After three military helicopters crashed in 1987 during routine night flights in Orange County, California, one reporter investigated the suspicious pattern. Military authorities initially maintained that there were no common cause in the crashes, but the reporter's investigation proved otherwise. After interviews established that all of the pilots who crashed had been wearing night-vision goggles, reporter Edward Humes made extensive FOIA requests for detailed accident reports and military data. Using the names provided in these reports, he interviewed families of crash victims, pilots, engineers and military officials to uncover the fact that obsolete night-vision goggles had led to at least 56 crashes and 130 deaths nationwide. In addition to winning a Pulitzer

Prize, Humes' series led to a congressional investigation, new safety regulations designed to better ensure the safety of military aviators, and improved equipment. *See* Humes, *Death in the Dark*, Orange County Register, December 4, 7, 8, 1988.

• In another series that shows the importance of getting behind anonymous statistics, reporters Sean Holton and Mark Vosburgh of The Orlando Sentinel wrote a series in 1989 that explored the consequences of Florida's policy of relieving prison overcrowding by releasing inmates back into society before their sentences had expired. The reporters cross-referenced computerized prison records with publicly available criminal history records to disclose that nearly a third of those inmates released early had committed new crimes while they still would have been serving time for the old crimes, but for the early release policy. If they had not been able to identify those inmates released through the prison records, the reporters would never have been able to show the impact of Florida's early release policy. As a result of the series, 55 of Florida's 67 sheriffs joined in a lawsuit challenging the early release policy. *See* Holton and Vosburgh, *Crime Before Its Time*, The Orlando Sentinel, August 13-16, 1989.

These articles succeeded in revealing troublesome government activities and promoting citizen responses because reporters obtained enough additional information to get behind the facts released by government authorities. Absent the ability to obtain names or other identifying details from the government, only incomplete information can be presented to the public. Moreover, anonymous, sanitized information rarely can have the same effect as stories about flesh-and-blood people. Identification of individuals strengthens the impact and credibility of newsworthy articles. It obviates any impression that the problem is remote or hypothetical, and brings home the immediacy and urgency of the topic. *See Gilbert v. Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir. 1981).

In supporting an analysis that considers potential uses of information as part of the public interest calculus, *amici* do not suggest that journalists should be specially favored regarding the disclosure of governmental information. As the court of appeals recognized, the concept applies even to non-media requesters. Nor does "derivative use," as petitioners suggest, "stand this Court's decisions on their head." Petitioner's Brief at 21. Contrary to Petitioner's assertion, "derivative use" will not automatically lead to release of information which substantially implicates privacy interests. The Department's argument to the contrary is, at bottom, nothing more than *ad horrendum* pleading. Assessing the potential "derivative use" of information applies only to the public interest side of the balance, which still must be weighed with the privacy interests involved. After the weighing is done, release will follow only when the public interest outweighs privacy interests. Thus, far from eliminating privacy from the calculus, a "derivative use" assessment restores public interest to the balance, preventing the Department from arguing, speciously, that something outweighs nothing every time. *See* Petitioner's Brief at 27.

"Derivative use," therefore, is a concept consistent with journalists' use of FOIA over the past 25 years and represents no new doctrine. It is completely consistent with FOIA's objectives to consider, in the balance between privacy and the public interest, the manner in which identifying information can be linked to government activities.

III. A CATEGORICAL ANONYMITY RULE GIVES TOO MUCH WEIGHT TO PRIVACY INTERESTS

The final flaw in the Department's proposed categorical anonymity rule is the equal weight it would accord all privacy interests, even trivial ones. Exemption 6 only allows withholding of information which "would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6). The Department's proposed anonymity rule

presupposes that *any* revelation of an individual's identity in *any* circumstances would justify withholding the information. This writes the "clearly unwarranted invasion of privacy" requirement out of Exemption 6.

The Department's proposed rule exalts privacy interests too much. The strength of privacy interests will vary. In general, FOIA recognizes no strong privacy interest in simply having one's identity revealed. Congress was more concerned with disclosures revealing "intimate detail" of a "highly personal nature." *See* H.R. Rep. 1497, 89th Cong., 2d Sess. 13 (1966); S. Rep. 813, 89th Cong., 1st Sess. 9 (1965). Even if identifying information can rise to the level of a "clearly unwarranted invasion of privacy," however, circumstances where this could occur are too variable to accept the Department's categorical rule. Rather, the privacy interest in an individual's identity must be assessed in light of a number of factors, including (1) the extent to which disclosure will lead to embarrassment or injury to reputation; (2) whether disclosure will lead to unreasonable intrusion; and (3) whether, given all the circumstances, the individual has a reasonable expectation of anonymity. Not all invasions of privacy are precluded through Exemption 6—"[it] does not protect against disclosure every incidental invasion of privacy—only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy." *Department of the Air Force v. Rose*, 425 U.S. at 382.

Analyzed in light of these factors, the court below correctly concluded that the Haitian returnees had some privacy interests which were nonetheless outweighed by the public interest in monitoring how the Department fulfills its responsibilities. 908 F.2d at 1554-56. *Amici* believe this careful, fact-intensive balancing of *both* privacy and the public interest far better serves FOIA's purposes than a rule which virtually ignores the pro-disclosure side of the scale.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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INTEREST OF *AMICI*

The American Civil Liberties Union (ACLU) is a non-partisan organization of almost 300,000 members dedicated to protecting civil liberties and civil rights. The ACLU has a long history of promoting full government disclosure of information through litigation and legislation. The ACLU also has a strong interest in protecting privacy rights and has supported legislation guarding private information from unwarranted disclosure.

The Computer Professionals for Social Responsibility (CPSR) is a non-partisan organization whose members include a Nobel Laureate and four winners of the Turing Prize, the highest honor in computer science. The CPSR supports both open access to government information and privacy protection for personal information.

When these two interests -- open government and individual privacy -- conflict in Freedom of Information Act (FOIA) cases under Exemption 6 or 7(C), the ACLU and the CPSR believe that FOIA requires courts to evaluate the strength of these competing interests to decide whether FOIA requires disclosure of the requested information. As an *amicus curiae* in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the ACLU argued that the lower court had incorrectly analyzed the competing interests. The lower court had taken a too narrow view of both the privacy interest and the public interest at stake with respect to disclosure of computerized criminal history records.

In this case, the ACLU and the CPSR urge the Court to recognize the substantial public interest that must be balanced against the privacy interest implicated by disclosure of the requested names and addresses. The

Government's assertions -- that there is no public interest in information that does not shed light "directly" on what the government is up to and that names and addresses of individuals virtually never shed light directly on governmental activities -- are directly at odds with this Court's holding in *Reporters Committee*. For these reasons, the ACLU and the CPSR urge the Court to reject the Government's analysis and to affirm the lower court's decision requiring disclosure.[1]

STATEMENT OF THE CASE

On September 23, 1981, the United States entered into an agreement with the government of Haiti for the purpose of preventing "illegal immigration" of Haitians into the United States. Agreement on Migrants--Interdiction, Sept. 23, 1981, United States-Haiti, 33 U.S.T. 3559, T.I.A.S. No. 10241. The agreement provided that the United States would interdict Haitians attempting to enter the United States illegally. *Ibid*. The United States also would repatriate all interdicted Haitians except those who "qualify for refugee status." *Ibid*. In return, Haiti agreed not to persecute the returnees for their departures. *Ibid*.

To evaluate the Government's policy of repatriating interdicted Haitians and to determine whether to continue that policy, the State Department began in late 1981 to monitor Haiti's compliance with its agreement not to persecute returnees. J.A. 42, 55, 56. First, officials assigned to the United States Embassy in Haiti obtained the interdictees' names and addresses as they were returned to Haiti by the U.S. Coast Guard. J.A. 56. Then, after passage of a few months, State Department personnel interviewed a sample of the returnees to determine whether they had been harassed or mistreated. J.A. 56.

From the interviews it conducted, the State Department concluded that Haiti was abiding by its agreement not to persecute returnees. J.A. 67-73. The Government accordingly continued to repatriate interdicted Haitians. J.A. 67-73. It also represented to the public and to the Immigration and Naturalization Service (INS) that undocumented Haitians living in the United States need not fear persecution upon return to Haiti. J.A. 67-73. In turn, an INS official granted a newspaper interview in which he was quoted as saying that the INS would release upon request the names of approximately six hundred Haitians who had been involuntarily returned to Haiti and who would confirm, if contacted, that they had not been mistreated. J.A. 28.

That newspaper story caused Respondent Michael D. Ray, a Miami attorney who represents Haitians in asylum cases, to request the INS to release the six hundred names pursuant to FOIA. J.A. 15, 19. The INS answered Mr. Ray's FOIA request by stating that the newspaper had misquoted the INS official and that the INS had no such list of six hundred names. J.A. 38-39.

Mr. Ray subsequently filed a FOIA request with the State Department, seeking reports of interviews conducted to monitor Haiti's treatment of returnees. J.A. 22, 41. Some two years later, the Department finally responded by releasing to Mr. Ray twenty-five documents relating to the Department's monitoring efforts. J.A. 41. Seventeen of those documents summarize interviews with individually identified returnees. But, invoking FOIA's Exemption 6, the Department redacted from those summaries

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[1]Counsel for the Petitioner and for the Respondents have consented to the submission of this brief *amicus curiae*. Their letters of consent are on file with the Clerk.

the names and addresses of the interviewees. J.A. 42. This lawsuit challenges the propriety of withholding those names and addresses.

SUMMARY OF ARGUMENT

This case is about how to evaluate competing interests in privacy and open government under Exemption 6. That exemption provides that agencies may withhold only personal information "the disclosure of which *would* constitute a *clearly unwarranted* invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1986) (emphasis added). Although the names and addresses at issue here are personal information that implicates an Exemption 6 privacy interest, that interest does not outweigh the strong public interest in the light that their release would shed on implementation of the Government's immigration policy. Thus, their disclosure would not "constitute a *clearly unwarranted* invasion of personal privacy," and FOIA compels their release.

The court below properly balanced the public and privacy interests at stake in this case. Pet. App. 13a. The Government's challenge, in contrast, badly distorts the Exemption 6 analysis. First, rather than submitting explicit evidence that disclosure would cause an invasion of privacy, the Government merely asserts that disclosure of the interviewees' names and addresses would subject them to *"possible* embarrassment" and subvert the *"understanding"* of confidentiality surrounding the interviews. As the courts below found, the interviewees have *some* interest in maintaining the privacy of their names and addresses. Pet. App. 7a-8a, 29a. But to demonstrate that the privacy interest at stake in this (or any other) Exemption 6 case is strong enough to justify nondisclosure, the Government must produce more than mere undocumented assertions.

The Government also ignores the full range of public interests to be considered in Exemption 6 and 7(C) cases. Consistent with FOIA's general philosophy of full disclosure, this Court has long held that FOIA's disclosure requirements are to be read broadly and its exemptions construed narrowly. *United States Department of Justice v. Julian*, 486 U.S. 1, 8 (1988) (citing *FBI v. Abramson*, 456 U.S. 615, 630 (1982); *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)). This interpretive maxim requires a broad definition of the public interests to be considered in Exemption 6 and 7(C) cases. Thus, *Reporters Committee* held that courts considering the public-interest side of the balance in such cases must determine whether release of the requested information would "shed *any* light on the conduct of *any* Government agency or official." 489 U.S. at 773 (emphasis added).

The information Respondents seek in this case undeniably would shed light on the State Department's conduct concerning its Haitian repatriation policy. Release of the interviewees' names and addresses would reveal the source of the facts underlying an aspect of the nation's immigration policy. It would further FOIA's "basic purpose . . . 'to open agency action to the light of public scrutiny,'" *Rose*, 425 U.S. at 372, by telling the public against whom the Government enforced its policy of repatriation and upon whom the State Department relied in evaluating that policy and in deciding to continue it.

Contrary to the Government's assertion, Pet. Br. 20-27, the public's interest in the names and addresses is quite strong. FOIA compels the release of that information unless the Government demonstrates that the interviewees' interests in maintaining the privacy of their names and addresses is so great that disclosure would be "clearly unwarranted." Speculation about *"possible* embar-

rassment" and suggestions of *"understandings"* of confidentiality do not outweigh the significant public interest in the information requested here. Accordingly, this Court should affirm the judgment of the court of appeals.

ARGUMENT

I. Application Of Exemption 6 Requires A Careful Weighing Of Individuals' Interests In Privacy And The Public Interest in Open Government.

Applying Exemption 6 requires a careful "balancing of the individual's right of privacy against the preservation of the basic purpose of [FOIA] 'to open agency action to the light of public scrutiny.'" *Department of the Air Force v. Rose,* 425 U.S. 352, 372 (1976) (quoting *Department of the Air Force v. Rose,* 495 F.2d 261, 263 (2d Cir. 1974)). The "preliminary question" in that balancing is whether the Government has demonstrated that release of the requested information would implicate "the sort of 'personal privacy' interest that Congress intended [Exemption 6] to protect." *United States Department of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 762 (1989). If not, the information must be disclosed. *Ibid.*

If the Government demonstrates that a personal privacy interest is implicated, the Court must consider a second question: whether there is a public interest in disclosure of the requested information. For purposes of Exemption 6, such a public interest exists if release of the information would "shed any light on the conduct of any Government agency or official." *Id.* at 773. If release would shed no such light, the agency may withhold the information. *Id.* at 780.

If disclosure would shed light on governmental conduct, FOIA requires a court to balance the public interest in its release against the implicated privacy interest. That balancing is significantly different under Exemption 6 than under 7(C). As this Court noted in *Reporters Committee*, "Exemption 7(C)'s privacy language is broader than the comparable language in Exemption 6 in two respects." 489 U.S. at 756. First, whereas 7(C) protects against an "unwarranted invasion" of privacy, Exemption 6 requires the invasion of privacy to be *"clearly* unwarranted." *Ibid.* Second, while Exemption 7(C) encompasses any disclosure that *"could reasonably* be expected to constitute" an unwarranted invasion, Exemption 6 is limited only to disclosures that *"would* constitute" a clearly unwarranted invasion. *Ibid.* Quite simply, the Government bears a heavier burden to justify nondisclosure under Exemption 6 than under Exemption 7. In Exemption 6 cases, FOIA compels disclosure unless the Government demonstrates that the individual's interest in maintaining the privacy of the information is so great that disclosure would be *"clearly* unwarranted." *Ibid.*; *United States Department of State v. Washington Post Co.,* 456 U.S. 595, 602 (1982).

In this case, the court of appeals properly conducted the Exemption 6 balancing process step by step. It first determined that there are Exemption 6 privacy interests at stake. Pet. App. 8a. It then weighed the public interest in knowing about the State Department's conduct concerning interdicted Haitians against the interviewees' interests in maintaining the privacy of their names and addresses. Pet. App. 8a-13a. The court concluded that the Government had failed to establish that disclosure would be "clearly unwarranted" in this case. Pet. App. 13a. Rather, any invasion of privacy resulting from disclosure would be outweighed by the strong public interest in release of the information. *Ibid.* That conclusion should be upheld.

II. The Government Bears A Preliminary Burden To Show That Disclosure Would Implicate A Significant Exemption 6 Privacy Interest.

An Exemption 6 privacy interest undeniably is at stake in this case. The name and address of each interviewee clearly constitute information about that person. Both "the common law and the literal understandings of privacy" traditionally encompass such personal information. *Reporters Committee*, 489 U.S. at 763. But that does not end the inquiry. The real question on the privacy side of the scale is whether the Government has carried its burden to show that the interviewees' have a strong privacy interest -- one strong enough to justify nondisclosure.

Several factors affect the significance of a personal privacy interest implicated by disclosure of governmental information. One such factor is whether disclosure would be reasonably likely to cause serious harm to the subject of the requested information. *See, e.g., Reporters Committee,* 489 U.S. at 780 (private citizen had strong privacy interest in preventing release of rap sheet containing information likely to injure his reputation); *Washington Post*, 456 U.S. at 597 & n.2 (members of Iran's revolutionary government had strong privacy interest in preventing disclosure of their American citizenship, as it would likely result in their physical abuse); *Rose*, 425 U.S. at 381 (disciplined service academy cadets had strong privacy interest in preventing their identification as honor code violators, because it would likely damage their professional military standing); *see also, e.g., Ditlow v. Shultz,* 517 F.2d 166, 170 (D.C. Cir. 1975) (air passengers who traveled a particular route during a specific period had "less than a substantial" privacy interest in release of their names and addresses where only likely result would be receipt of class-action notice).

Another factor affecting the significance of the privacy interest is whether the requested information describes the subject's interaction with an agency of the Government or with private parties. *See, e.g., Hopkins v. HUD*, 929 F.2d 81, 87 (2d Cir. 1991) (finding "significant" privacy interest in payroll information revealing how much private parties were paid by their private employers). Others include whether the requested information is "freely available" in substantially the same form, *Reporters Committee,* 489 U.S. at 763-64, whether federal, state, or local legislation recognizes the private nature of the information, *id.* at 765, whether a governmental promise of confidentiality was necessary to obtain the information, *Washington Post Co. v. HHS,* 690 F.2d 252, 263 (D.C. Cir. 1982), and whether the requested information concerns one person or many. *Reporters Committee,* 489 U.S. at 775, 780 (noting strong privacy interest implicated by "FOIA request for information about a particular private citizen").

In order to demonstrate a *significant* privacy interest, the Government must produce specific evidence concerning the foregoing (or similar) factors. Here, the Government's declarations are simply insufficient to establish that a significant privacy interest would be clearly threatened by disclosure of the interviewees' names and addresses. The Declaration of John Eaves states merely that release of the interviewees' names and addresses "would . . . subject them or their families to *possible* embarrassment in their social and community relationships." J.A. 43 (emphasis added). But "Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities." *Rose,* 425 U.S. at 380 n.19. The Government must affirmatively show that release would cause an invasion of privacy. The Eaves declaration does not carry that burden, especially given the fact that the interview summaries themselves reveal that State Depart-

ment personnel told many interviewees' neighbors about the interviews. *See, e.g.,* Pet. Lodging 4 (stating that the returnee officer "asked some women sitting outside [deletion] if they were acquainted with [deletion] and explained that [the officer] wanted to interview him to learn how he had been since his return after the 7/12/83 interdiction of the 'C'est la Vie'").[2]

Neither does the Government provide sufficient evidence that the Department's interviewers promised confidentiality. In his declaration, Mr. Eaves suggests that "those who were interviewed consented to the procedures *with the understanding* that their conversations with Embassy officers would be conducted under conditions of privacy and confidentiality." J.A. 42-43 (emphasis added). But Mr. Eaves did not participate in the interviews; he did not hear what was said and could not know what the interviewees "understood." His declaration does not recount what the interviewers told the interviewees or in any other way establish that the Government promised to keep confidential the fact that certain persons consented to be interviewed. Even less does it show that any promises or understandings were necessary to secure the interviews. *Cf. Critical Mass Energy Project v. NRC,* No. 90-5120, slip op. at 14-15 (D.C Cir. Apr. 30, 1991) (to justify nondisclosure under Exemption 4, Government must produce specific evidence that confidentiality was necessary to obtain requested information). Indeed, such a showing would be difficult in light of the State Department's admissions that many of the interviewees traveled to the U.S. Embassy of their own

[2]There is no contention here that disclosure of the interviewees' identities would reveal whether they had applied for political asylum. That information is both presumptively confidential, *see* 8 C.F.R. § 208.6 (1991), and reasonably likely, if disclosed, to subject such an applicant to substantial risk of retaliation.

accord and volunteered to talk to American officials about their experiences. *See, e.g.,* Pet. Lodging 10, 12.

Moreover, even assuming that the Government made such promises, confidentiality and personal privacy are not synonymous. Governmental promises of confidentiality do not, by magic, convert disclosures of information into invasions of personal privacy. If they did, State Department promises, rather than the will of Congress, would determine the scope of Exemption 6. *Washington Post Co. v. HHS,* 690 F.2d at 263. Instead, a promise of confidentiality is one factor to be considered in determining whether disclosure would cause an invasion of personal privacy. *See supra* at 9. Standing alone, however, such a promise cannot justify nondisclosure. *Washington Post Co. v. HHS,* 690 F.2d at 264. If the Government is to demonstrate that a privacy interest is so significant that its invasion would be clearly unwarranted, it must offer more than "understandings," "possibilities," and rhetoric.

III. Disclosure Of The Interviewees' Names And Addresses Would Serve The Public Interest By Shedding Light On State Department Conduct.

The Government's assertions concerning the public-interest side of the scale are similarly inadequate to justify nondisclosure. In *Reporters Committee,* this Court made clear that for the purposes of Exemption 6 and 7(C) the public has an interest in the disclosure of any information that would "shed any light on the conduct of any Government agency or official." 489 U.S. at 773. This standard must be read broadly to effectuate FOIA's mandate of full agency disclosure. *United States Department of Justice v. Julian,* 486 U.S. 1, 8 (1988). The Government ignores this principle. Instead, it seizes on the single appearance of a single word in this Court's

opinion in *Reporters Committee* and argues that the light cast by the interviewees' names and addresses would not shine "directly" enough on the State Department's performance to give the public an interest in their disclosure. Pet. Br. 23-25.

The information Respondents seek here undeniably would shed light on the State Department's conduct concerning its repatriation policy. Indeed, release of the interviewees' names and addresses would shed light *directly* on that conduct: it would tell the public whom the Department consulted to obtain the facts underlying its evaluation and continuation of its policy of repatriating interdicted Haitians. Thus, even under the Government's test, the public has an interest in such release. But the Government's insistence that the public has an interest only in information shedding light "directly" on agency conduct misses the point.

In asserting that the public's interest in the Haitian interviewees' names and addresses would not tell us anything "directly" about the State Department's activities, the Government ignores the context of the word on which it so heavily relies. In *Reporters Committee,* this Court was asked to accept that the public had an interest in information concerning the unlawful conduct of Charles Medico -- a private person -- as a basis for *inferring* that a Congressman with whom he was allegedly associated also had engaged in criminal activity. The Court acknowledged that determining whether the Congressman had engaged in unlawful conduct met the public-interest test of Exemption 7(C). 489 U.S. at 774. But the Court concluded that the requested information provided no way to answer the question posed: Was *the Congressman* involved in criminal activity? In short, the Court held that the requested information would not shed light

directly, indirectly or otherwise on any *government* conduct. That simply is not the case here.[3]

The Government's argument, in reality, is that the public has an interest only in disclosure of information that sheds light on the *quality* of an agency's performance -- that is, whether the agency functioned well or poorly or made mistakes or not. Thus, the Government argues that recognition of the public's interest in the interviewees' names and addresses would require the Court to guess whether the interviewees would tell Respondents something other than what they told the State Department interviewers. Pet. Br. 26. But FOIA was not enacted only to shed light on the Government's mistakes. It was enacted to "ensure an informed citizenry." *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978). The "public interest in disclosure is not diminished by the possibility or even the probability that [the State Department] is doing its . . . job right." *Washington Post Co. v. HHS,* 690 F.2d at 264. As this Court stated in *Reporters Committee*, the public has an interest simply in knowing "what [the] government is up to." 489 U.S. at 773.

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[3]The Government also overlooks the pragmatic concern underlying *Reporters Committee* -- the likelihood that when "one private citizen is seeking information about another," he often has no "inten[tion] to discover anything about the conduct of the agency that has possession of the requested records" but rather intends only to shed light on *private* conduct. 489 U.S. at 773. Thus, *Reporters Committee* focused on the distinction between information with a potential to shed light on *official* conduct and that with the potential to shed light only on *private* conduct. It did not focus, as the Government suggests, on the difference between information which, *in and of itself,* sheds light on official conduct and that which provides *a means* to shed such light. In *Reporters Committee,* the latter distinction was irrelevant, because the requested information provided no means to shed light on *the Congressman's* behavior. *Id.* at 774.

By definition, FOIA's concern with open Government embraces preventing the existence of secret agency law as well as preventing the secret application of that law. The disclosure of the identities of persons deported by the Government would fall squarely within that purpose and within the definition of the public interest formulated in *Reporters Committee*. In short, the public has an interest simply in *knowing* on whom the Government acts and on whom it relies in formulating, evaluating and implementing its policies. That interest exists regardless of the wisdom or legality of such action or reliance, and it would be furthered by disclosure of the information here.[4]

Even if the Exemption 6 analysis required a showing that the requested information would shed light on the wisdom or legality of agency conduct, that test is met here. As the court of appeals observed, release of the names and addresses would enable Respondents to "locate the Haitian returnees and inquire about how they were treated after they were returned to Haiti." Pet. App. 9a. From such inquiries, Respondents would be able to determine whether the interview summaries on which the Department based its decisions concerning repatriation accurately reflect the experiences of the returnees.[5] That determination would enable Respondents to form their own conclusions whether the returnees' experiences in fact support the Government's continued policy of repatriating interdicted Haitians. Thus, disclosure very definitely would shed light on the quality of the Department's performance.

IV. The Government's Insistence On Directness Only Confuses The Exemption 6 Balancing Process.

At base, the "directness" with which disclosed information would shed light on agency conduct is irrelevant to the public-interest side of the Exemption 6 balance. The public's interest in requested information depends on *whether* its disclosure would shed light on agency conduct, *Reporters Committee*, 489 U.S. at 773, not on *how* -- directly or indirectly -- it would do so.

If anything, "directness" affects the weight of the individual's interest in maintaining the privacy of requested information. In this case, for example, Respondents candidly admit that, in order to learn every-

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[4]The Government is simply wrong when it argues that applying the Eleventh Circuit's reasoning to the facts of the *Rose* case "would have required the Air Force to disclose the identifying information" contained in the Academy's disciplinary case summaries. Pet. Br. 21-22. Recognizing the public's interest in disclosure is only one part of the Exemption 6 balancing process. That interest must then be weighed and balanced against the individual's privacy interests to determine whether disclosure would be "clearly unwarranted." Thus, recognizing the public interest in the disciplined cadets' identities would not have required disclosure. It merely would have necessitated the very balancing of interests in which the Court engaged with respect to other aspects of the summaries.

The Government's argument concerning application of the Eleventh Circuit's analysis to the facts of *Reporters Committee* is similarly flawed. In that case, the journalists failed to litigate the most relevant public interest -- shedding light on the FBI's conduct regarding the maintenance of rap sheets. This unlitigated interest would have had to be balanced against Medico's privacy interest, which this Court held to be at its "apex." *Reporters Committee*, 489 U.S. at 780. Thus, affirmance of the Eleventh Circuit's public-interest analysis would not throw open agency files. Rather, it would merely require the balancing of interests mandated by Congress.

[5]The Government mistakenly cites *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), for the proposition that FOIA recognizes no public interest in nongovernmental information. *See* Pet. Br. at 24. That case held only that FOIA confers no cause of action for "an agency's failure to sue a third party to obtain" documents wrongfully removed from governmental custody. 445 U.S. at 151.

thing they can about the State Department's performance, they need to contact the interviewees. Although some courts have considered contact with subjects of requested information relevant to the Exemption 6 balancing process, those courts traditionally have evaluated such contact as a factor affecting the weight of the individual's privacy interest. *See, e.g., Ditlow,* 517 F.2d at 170 & n.15. Thus, the Government errs when it insists that Respondents' need to contact the interviewees affects the public-interest side of the Exemption 6 balance.

The Government's error is readily apparent in the absurd results application of its analysis would produce. For example, the Government's analysis would recognize the public's interest in release of information that "directly" sheds light on the performance of purely ministerial functions but not in information that "indirectly" sheds light on the implementation of crucial governmental policies of widespread public concern. Nothing in this Court's precedents or in the lower-court decisions on which the Government relies justifies such a result.[6]

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[6]The Government relies heavily on *Hopkins v. HUD,* 929 F.2d 81 (2d Cir. 1991), to support its argument concerning directness. Pet. Br. 22-23. The Second Circuit's opinion in that case does state that "disclosure of information affecting privacy interests is permissible only if the information reveals something *directly* about the character of a government agency or official." 929 F.2d at 88. But the holding of *Hopkins* is that for purposes of Exemption 6 "there is little or no public interest in disclosure of the identifying information contained in the certified payroll records" submitted to HUD. *Id.* at 89. That holding is entirely consistent with the public-interest analysis articulated herein.

Unlike the State Department in this case, HUD did not "act on" the construction workers in *Hopkins*. It did not hire them; it did not pay them; it did not contact them. Moreover, it did not formulate, evaluate, or implement any policy based on anything the workers said or did. Thus, identification of the workers would not tell the public *anything* -- whether directly or indirectly -- about the *Government*.

CONCLUSION

The public has a strong interest in knowing the names and addresses of the Haitian returnees interviewed by the State Department, because their disclosure would shed light on the Department's performance of its duty to monitor Haiti's treatment of returnees and on the Government's decision to continue its policy of repatriating Haitians interdicted en route to the United States. In contrast, the Government has failed to demonstrate the existence of a strong privacy interest on the part of the interviewees. Thus, in this case, the public interest in disclosure outweighs the limited privacy interest implicated by revealing the identities of the returnees who spoke with the State Department about their experiences, and the Government has failed to establish that any invasion of privacy resulting from disclosure would be "clearly unwarranted." Accordingly, the judgment of the court of appeals should be affirmed.

June 14, 1991

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In The
Supreme Court of the United States
October Term, 1990

No. 90-747

UNITED STATES DEPARTMENT OF STATE,

Petitioner,

v.

MICHAEL D. RAY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, HUMAN RIGHTS WATCH, THE HAITIAN REFUGEE CENTER, INC., THE NATIONAL COALITION FOR HAITIAN REFUGEES, PUBLIC CITIZEN, AND THE FREEDOM OF INFORMATION CLEARINGHOUSE IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI*

This brief is filed, with the written consent of the parties, on behalf of the following organizations which have a direct interest in the United States' immigration and asylum policies with respect to Haiti: the Lawyers Committee for Human Rights, Human Rights Watch, the Haitian Refugee Center, Inc., and the National Coalition For Haitian Refugees, as well as Public Citizen and the Freedom of Information Clearinghouse, non-profit

public interest organizations that promote public access to government information.

This case seeks access to the names of Haitian citizens who were interviewed by State Department personnel in the course of monitoring the Haitian government's compliance with its pledge not to persecute persons returned by the United States to Haiti. A ruling granting access would greatly facilitate the role that these *amici* play in monitoring the government's activities with respect to those Haitians. The open government organizations -- having litigated over two hundred Freedom of Information Act ("FOIA") cases over the last twenty years -- are interested in this case because it will have a significant impact on the scope of the privacy exemption under the FOIA's Exemption 6. Because of their experience with both the substantive problems of Haitian refugees and the operations of the FOIA, *amici* are able to offer a different perspective than that of the respondent.

STATEMENT

In 1981, President Reagan determined that illegal Haitian migration, although accounting for only 2% of all illegal aliens, had become a "serious national problem," and he ordered that the "Haitian Migrant Interdiction Program" be established. *See* Executive Order 12324 of September 29, 1981, 46 Fed. Reg. 48,107. As part of that Executive Order, no individuals who qualified for refugee status were to be returned to Haiti without their consent. Joint Appendix ("J.A.") 54-55. And, in a cooperative agreement with Haiti entered into on September 23, 1981, no returned Haitians were to be persecuted for illegally departing Haiti. J.A. 54.

The process under which the Haitian refugees are returned to their country is an open one in which the Haitian government and the Haitian people generally are fully aware of the identities of those who sought to escape to the United States. Nearly 400 boats carrying undocumented Haitians have been intercepted by the Coast Guard since 1981. Lawyers Committee for Human Rights, "Refugee Refoulement: The Forced Return of Haitians Under the U.S.-Haitian Interdiction Agreement" 3 (1990) [hereafter "Refugee Refoulement" (the return of escaping Haitians)]. To process the Haitians, Immigration and Naturalization Service ("INS") officers are to interview each person aboard an interdicted vessel. *Id.* At the time of interdiction U.S. officials in Miami inform U.S. officials in Haiti of the identities of those who have been captured, and they in turn alert the Haitian Foreign Ministry, the Haitian Immigration Service, and the Haitian Red Cross. *Id.* at 24. At the Port-au-Prince main pier, where the returnees are brought back to Haiti, the officials meeting the boat are given copies of the ship's manifest, bearing the names, ages, and places of residence of all returnees. *Id.* United States embassy officials observe the return and the processing of the returnees, and they record their names and places of residence in Haiti. J.A. 56.

Until 1986, occasional follow-up interviews were conducted unofficially by the embassy personnel to ascertain whether the returnees had been punished. J.A. 56, 58. According to one U.S. Embassy official, only a small percentage of the returnees actually were interviewed because locating them was difficult and costly. After former dictator President Jean Claude Duvalier was ousted in 1986, the embassy discontinued the practice. Refugee Refoulement at 23-24.

United States policy with respect to Haitian refoulement has been monitored intensively by the human rights community and the American press because of the notorious turmoil in Haiti throughout the 1980s and the increasing flow of Haitians seeking refuge in the United States. Despite the political unrest in Haiti, the Department of State has maintained that the Haitian governments have not been persecuting returned Haitians. *See* J.A. 38. This position, embodied in "Advisory Opinions" submitted by the State Department in numerous asylum cases, was based in part on interviews conducted by federal personnel in Haiti. *See* J.A. 58. Not coincidentally, from 1981 through 1990, only 8 of more than 20,000 Haitians seeking refugee status, which requires proof of a well-founded fear of prosecution, have been allowed by the United States government to pursue asylum claims. *Miami Herald*, "Record Number of Haitians Allowed Back to Miami to Pursue Asylum," April 9, 1991 at B1-2. The documents at issue in this case will help enable the public to determine whether the United States has been effectively monitoring the U.S.-Haitian cooperative agreement, and whether the government has been assessing correctly the Haitian govern-

ment's treatment of the Haitian nationals after their return to Haiti.

The facts giving rise to this proceeding are simple. Respondent Michael Ray, a lawyer who has represented several Haitian asylum applicants, brought this action under the Freedom of Information Act, 5 U.S.C. § 552, on behalf of himself and three Haitian nationals seeking political asylum in the United States, to obtain State Department records of "follow-up" interviews of the Haitians conducted by federal personnel. J.A. 14-27. Ray requested the documents to test the validity of statements in Miami newspapers in which INS officials were quoted as stating that Haitian returnees were not being persecuted after they returned to Haiti. *Id.* Ray wanted to contact the returned Haitians to test both the government's public assertions and the State Department's advisory opinions to the INS in asylum applications proceedings, which contend that Haitians do not face ill treatment upon their return to Haiti. *See* J.A. 18, 24-26.

After a long delay and procedural twists not at issue here, the INS redirected Ray's requests to the State Department. J.A. 21-22. The State Department eventually released 25 documents, but deleted from 17 of those documents the names and other information that would identify individual Haitians who had been interviewed following their return to Haiti, relying on the FOIA's Exemption 6, which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). J.A. 41-42. This suit against the Department of State followed.

The district court conducted the balancing required by Exemption 6 and weighed the privacy interests of the returnees against the public interest in access to this information. Under this balancing, it ruled that the returnees' privacy interest was slight, if not "theoretical," and found that "this country's immigration policy supports a finding that the public has a legitimate interest in the safe relocation of returned Haitians" that outweighs what would amount to a minimal intrusion into the privacy of the Haitian nationals. *Ray v. United States Dep't of Justice*, 725 F.Supp. 502, 504-05 (S.D. Fla. 1989).

The Eleventh Circuit affirmed, relying on *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). The court of appeals agreed with the

district court's conclusion, but it assigned different weights to the factors considered. *Ray v. United States Dep't of Justice*, 908 F.2d 1549, 1554 (11th Cir. 1990). The court started the balancing process by noting that privacy interests were implicated because Ray had announced that he intended to contact the individuals, once the petitioner released their names, to confirm that they had not been persecuted after their return. *Id.* The court also considered the government's assertion that it had promised confidentiality to the Haitians, but noted that, although relevant, the promise was not a dispositive factor. *Id.* "Thus," concluded the court, "we begin the balancing process by acknowledging that there are significant privacy interests at stake here." *Id.*

The court then discussed the purposes of the Act, repeating that the Act is not intended to assist citizens in gaining information about other individuals for private purposes, but rather "'to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny . . . .'" *Id.* at 1555, *quoting Reporters Committee*, 489 U.S. at 774 (emphasis in original). The court dismissed petitioner's characterization of Ray's objectives and stressed that Ray sought the information also "to learn whether the United States government is adequately monitoring Haiti's compliance with its obligation not to persecute returnees and to learn whether our government is honest to the public about Haiti's treatment of returnees." *Id.* Under this equation, the court concluded that "these . . . matters of great public interest [are] significant enough to outweigh the privacy interests of the Haitian returnees." *Id.*

To explain its outcome, the court embarked on a detailed analysis of this Court's decision in *Reporters Committee*. The Eleventh Circuit reasoned that denying disclosures of a "rap sheet" about a private individual, whose release would "not shed any light on the government or a government agent," did not preclude the possibility that in other cases, like this one, a FOIA request about private individuals may "involve legitimate public interests, . . . the kind which Congress had in mind in framing FOIA." *Id.* at 1555-56. Finally, the court concluded that the government had not met its burden of demonstrating that the disclosure "would constitute a clearly unwarranted invasion of personal privacy" and "that the invasion of privacy that will likely result from disclosure is outweighed by the strong public

interest in the information." *Id.* at 1556.

SUMMARY OF ARGUMENT

The decision below should be affirmed because the government has failed to meet its burden of demonstrating that the release of the names would constitute a clearly unwarranted invasion of privacy. The privacy interests in this case are relatively insignificant, if they exist at all. Neither the promise of confidentiality nor the ascribed "stigma" that petitioner invokes requires a contrary result because the identities of those who left for the United States and were returned is no secret in Haiti. Indeed, such information is routinely provided by the United States government to the Haitian government, the entity that was most likely to "invade the privacy" of the returnees by harming them in some way. Moreover, the record is devoid of any indication that the promises of confidentiality made by U.S. federal personnel to the interviewed returnees had any significance to them, as opposed to the United States government.

Even if some weight were given to these privacy concerns, the public interest still outweighs them. The public has an interest in knowing whether the United States has effectively monitored Haiti's compliance with the non-persecution provision in the cooperative agreement. Moreover, it has an interest in testing the validity of the government's position in those asylum cases where petitioner has issued an advisory opinion, based in part on interviews with returnees whose identities respondents seek in order to verify the government's claims. United States asylum practices have been notable during the last decade not only for the United States government's continuous assertions that returned Haitians were not being persecuted -- despite successive repressive Haitian regimes and political turmoil bordering on anarchy -- but also for the sheer volume of rejected asylum candidates.

Petitioner argues both that "responsible disclosure under Exemption 6" requires "anonymity" and that the names and other identifying information about the Haitians interviewed need not be disclosed because the information sheds no direct light on the government's activities on its face or "intrinsically" but requires "derivative use" or context. These arguments, and

the reading of *Reporters Committee* proffered by petitioner, are completely contrary to the FOIA and its legislative history. In essence, petitioner seeks to create both a *per se* anonymity rule that destroys the balancing test Congress wrote into Exemption 6 and a categorical exemption from disclosure for all documents which on their face do not directly discuss government activity -- such as a list of names. Such a claim should be rejected here because the requested records would enable respondents to gather significant information about the workings of the federal government and are therefore precisely the type Congress wanted released under FOIA.

ARGUMENT

THE DECISION TO DISCLOSE MUST BE AFFIRMED BECAUSE PETITIONER HAS FAILED TO SHOW THAT THE RELEASE OF THE NAMES WOULD CONSTITUTE A "CLEARLY UNWARRANTED INVASION OF PRIVACY" UNDER EXEMPTION 6.

When promulgating the FOIA, Congress established "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976), *quoting* S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965), reprinted in Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* 38 (1974) [hereinafter FOIA Source Book]. To protect privacy rights, Congress included two exemptions to FOIA's broad access mandate that apply to files concerning individuals. One of these, Exemption 6, allows agencies to withhold records the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6).

Exemption 6 does not forbid all invasions of privacy, but only those that are "clearly unwarranted." Congress sought to exclude from mandatory disclosure "those kinds of files the disclosure of which might harm the individual." H. R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), FOIA Source Book at 32. Congress rejected a categorical privacy exemption because such

an approach would not take into account the many factors that need to be considered in determining whether privacy interests outweighed interests in disclosure of particular records. *Id.* Instead of providing for a categorical exemption, "Congress enunciated a single policy, to be enforced . . . by the courts, 'that will involve a balancing' of the private and public interest." *Rose*, 425 U.S. at 373 (internal quotation omitted). *See also Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). In so doing, Congress "concluded that the balancing of private against public interests . . . should limit the scope of the exemption: 'It is believed that the scope of the exemption is held within bounds by the use of the limitation of' a clearly unwarranted invasion of personal privacy." *Washington Post Co.*, 456 U.S. at 599, *quoting* S. Rep. No. 813, at 9. This mandate has remained unchanged by Congress despite significant amendments to the FOIA in both 1974 and 1986, and courts over two decades have conducted this balancing of interests.

To withhold documents under the exemption, an agency must establish three factors: that the documents constitute personnel or medical or similar files; that disclosure would constitute an invasion of privacy; and that the invasion would be clearly unwarranted. *Ripskis v. Department of Housing & Urban Dev.*, 746 F.2d 1, 2-3 (D.C. Cir. 1984) (court applied "settled three-step analysis"). There is no dispute that the withheld records constitute personnel or similar files and that they therefore meet the threshold requirement of Exemption 6. Accordingly, the inquiry here begins with an assessment of the privacy interests at stake. If privacy interests are not implicated by the disclosure of the records or are found to be *de minimis*, then Exemption 6 is not properly invoked, and the broad access mandate of FOIA controls. *See National Ass'n of Retired Fed. Employees (NARFE) v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *citing Department of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989). If, and only if, disclosure would implicate privacy concerns must courts then determine, on the facts of the case at hand, whether the invasion is "clearly unwarranted," or whether the public interest in disclosure outweighs the private interest in non-disclosure. *See Rose*, 425 U.S. at 373. Contrary to the inverted inquiry set forth in petitioner's brief, it is this process -- written into the text and structure of the statute -- that requires

the Court to first assess the privacy interests at stake.

A. NO MATERIAL PRIVACY INTERESTS ARE AT STAKE HERE.

There is nothing inherently private in a list of names. The government routinely keeps lists of names in all kinds of contexts, and courts have required the disclosures of those lists, especially where, as here, to do so benefits the individuals whose names are disclosed or poses little risk of stigmatization. *See, e.g., Disabled Officers Ass'n v. Rumsfield*, 428 F.Supp. 454 (D.D.C. 1977) (privacy loss from disclosure of names outweighed by public interest where named individuals benefitted from disclosure), *summarily aff'd*, 574 F.2d 636 (D.C. Cir. 1978); *Kurzon v. Department of Health & Human Services*, 649 F.2d. 65, 69 (1st Cir. 1981) (frail evidence of stigma from disclosure of names of rejected grant recipients).

In this case, however, the government claims that this list of Haitian names raises four privacy concerns that weigh against disclosure: (1) the disclosure of a person's identity found within a government document is in itself an invasion of privacy leading to the potential for unwanted solicitation; (2) the disclosure would identify the Haitian interviewees as persons who cooperated with the United States government on a confidential basis, thus subjecting the individuals or their families to social stigma; (3) the disclosure would reveal personal information which invades the individual's privacy; and (4) because the Haitians were interviewed under a promise of confidentiality, they have a heightened expectation of privacy. Petitioner declined to take any meaningful assessment of these identified interests because it contends that analysis of "the *degree* of the privacy invasion that would occur should be unnecessary" Pet. Br. at 27 (emphasis in original), once a lack of public interest in the documents is established. Nevertheless, none of these concerns, whether assessed before or after consideration of the public interest at stake, rises to the level of a "clearly unwarranted invasion of privacy."

First, the government's claim that the disclosure of a person's name within a government document in itself is "a significant invasion of personal privacy," Pet. Br. at 27, would, if

accepted, create a *per se* rule excluding names from disclosure. The cases cited by petitioner for the proposition that disclosure is itself a significant invasion of privacy all involve results where some privacy concern was weighed against absolutely no public interest -- yielding a "something beats nothing" conclusion that therefore the disclosure is "unwarranted." *See, e.g., Federal Labor Relations Authority v. United States Dep't of the Treasury*, 884 F.2d 1446, 1451-52 (D.C. Cir. 1989); *NARFE*, 879 F.2d at 879 (list of apparent commercial value not disclosable because "something, even a modest privacy interest, outweighs nothing every time"). Those decisions, however, are far from establishing a premise of a "right to be let alone" from disclosure of names or a *per se* rule that disclosure of a list of names is an "unwarranted invasion of privacy," a conclusion that would write the congressional balancing test out of Exemption 6. *See NARFE*, 879 F.2d at 877 ("the disclosure of names and addresses is not inherently and always a significant threat to the privacy of those listed").

The government also suggests that Ray's stated intent to find individuals, to "check" whether they have been interviewed, and to review the manner in which that interview was conducted, is a factor "further aggravat[ing] the extraordinary invasion of personal privacy." Pet. Br. at 31. However, the government fails to explain why a phone call, mail solicitation, or even visit cannot be ignored or refused like any other unwanted solicitation, *see Riley v. National Fed. of the Blind of North Carolina*, 487 U.S. 781, 788-89 (1988); *Shapero v. Kentucky State Bar Ass'n*, 486 U.S. 466, 477 (1988); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 72 (1983); *Consolidated Edison Co. v. Public Serv. Comm'n of New York*, 447 U.S. 530, 542 (1980). Nor does it explain why this sort of privacy invasion, "produced as a *secondary effect* of the release," *Arieff v. U.S. Dep't of the Navy*, 712 F.2d 1462, 1468 (D.C. Cir. 1983) (emphasis in original), is likely to produce results akin to the disclosure of a list which will be used for commercial solicitation. More importantly, the government never explains how this invasion conducted by a private citizen with no power over the interviewee is any more intrusive than its very own behavior in conducting essentially the same interviews with these same individuals, a process that was discontinued only because U.S. Embassy officials in Haiti indicated that it is difficult, time-consuming, and expensive, not because of privacy concerns.

Second, petitioner makes much of the alleged social "stigma" that would result from the revelation that particular Haitians talked to the United States government. This specter of "stigma," unfairly compared to that suffered by a foreign national in a country publicly opposed to cooperation with our government, Pet. Br. at 29, is, at best, unsubstantiated. To begin with, the interviewees are a group of people who, at great peril, sought to abandon their country to live in the United States. Both their communities and their government already know who they are because of their flight, their absence, and their return to the dock in Port-au-Prince, where the United States government told Haitian officials to meet them. Moreover, if the claims of persecution can be substantiated, it may benefit those Haitians, including perhaps some of the interviewees, who may seek asylum in the future. And, it might well be in their interest to cooperate with respondents if for no other reason than to ensure that their stories get told. For example, the publication of names is a common method, used by groups such as Amnesty International, to provide protection against persecution.

Further, any stigma resulting from an interview with officials of the country to which these individuals attempted to flee has already been inflicted by the initial interview each returned Haitian is required to have with INS officials on the intercepted boat, or from the U.S. government's own follow-up visit and interview. Thus, an interview with respondent can, at most, produce only a marginally greater stigma than the widely known fact of flight itself, or the lesser known fact regarding the earlier government interview in Haiti. The Eaves Declaration (J.A. 43) offers no basis upon which the Court could evaluate the supposed marginal increase in "stigma" that would result from disclosure because it is totally conclusory and unsubstantiated.

Third, the description of the interviews in the documents that petitioner has already released are not as detailed as the government suggests, and the few identifying facts are no secret to anyone in Haiti who wishes to learn them. Moreover, the legislative history of Exemption 6 reflects Congress' intent to exclude from mandatory disclosure only "those kinds of files the disclosure of which might harm the individual." H.R. Rep. No. 1497, FOIA Source Book at 32. The government fails to explain

how disclosure of this kind of information might harm the contacted individual, especially since the individuals who fled would presumably welcome any attempt by others to support their claim of persecution and their potential for future asylum.

Finally, petitioner recognizes that the promise of confidentiality is not dispositive, Pet. Br. at 31, but then asserts that the "uncontradicted record establishes that this understanding was important in causing the Haitian nationals to confide in U.S. officials." Pet Br. at 32, *citing* J.A. 56, 62-63. That is hyperbole, at best. The cited portion of the record contains only statements from the *government* about the importance to the *government* of the confidentiality pledge; the record is devoid of any statements by Haitian refugees that, without such a pledge, the information would not have been forthcoming.

More importantly, the record is uncontradicted because, without the names of the individuals interviewed, there is no possibility of exploring the extent to which those individuals had faith in that promise, and there are no means to test whether those interviews were conducted with the clear understanding that they would be held confidential, or whether that understanding even mattered to the interviewed individuals. Where the evidence "is unclear that the [declarants] . . . either know or care about the confidential nature of their statements," the Court cannot determine the effects of disclosure upon the declarants' willingness to talk. *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, No. 90-5120, slip op. at 14 (D.C. Cir. April 30, 1991) (where record in Exemption 4 case contained "absolutely no testimony from [sources] regarding the importance of confidential treatment," court declined to accept "self-interested speculations by officials of the entities resisting disclosure"). Although the government should be able to invoke a promise of confidentiality as an added privacy concern when that promise was needed to obtain information, it cannot do so as a routine incantation simply to resist disclosure. *See Washington Post v. U.S. Dep't of Health and Human Serv.*, 690 F.2d 252, 263 (D.C. Cir. 1982). Mere promises of confidentiality do not stand in the way of disclosure. *Id.*; *Robles v. EPA*, 484 F.2d 843, 846 (4th Cir. 1973); *Ackerley v. Ley*, 420 F.2d 1336, 1340 (D.C. Cir. 1969).

In light of the weak privacy concerns set forth by the

government, the second part of the inquiry -- whether there is a specific public interest here in disclosure -- need not be reached. Nevertheless, we now explain the specific public interest in disclosure here and then turn to the flaws in petitioner's method of assessing the public interest under Exemption 6.

B. THE PUBLIC INTEREST IN DISCLOSURE OUTWEIGHS ANY PRIVACY INTERESTS AT STAKE.

The FOIA provides a broad mandate to "open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 372. In *Reporters Committee*, this Court made clear that neither the identity of the requester nor the purposes for which the request is made will determine whether an invasion of privacy is warranted. 489 U.S. at 771. Although the information Ray seeks may be useful to his efforts on behalf of his clients, access to the list of names will provide any member of the public, including *amici* and their members, the means to learn firsthand how effectively the United States government monitored the cooperative agreement and whether the Haitian government was upholding its part of the bargain. It is this release to the public that is to be weighed against any identified privacy interests. *See Ditlow v. Shultz*, 517 F.2d 166, 171-72 & n.21 (D.C. Cir. 1975).

Although the records at issue belong to the State Department, the public interest also extends to the INS' role in the treatment of returnees. On April 1, 1991, the *Miami Herald* reported (BI) that, from 1981 until 1990, only eight of 22,000 interdicted Haitians were allowed by the INS to enter into South Florida to pursue asylum claims. According to the article, the INS was stung by criticism from human rights and immigration groups over its cursory, inadequate, and unprincipled asylum practices and policies with respect to Haitians, and therefore it has recently issued more thorough interview guidelines for captured Haitians in an attempt to revise "the highly criticized interdiction policy." *Id.* As a result of the new INS reforms, nine of the 106 Haitians interdicted at sea on one day in early April of this year will be allowed to pursue asylum claims -- "a record-breaking number" that outstrips the number produced from the last decade's worth of boats stopped. *Id.*

The specific public interest in this FOIA request is twofold:

First, the public has an interest in knowing whether the United States has effectively monitored Haiti's compliance with the non-persecution provision in the cooperative agreement between the two countries. Second, the public has an interest in assessing the validity of the government's position in asylum cases where it issues advisory opinions, based on interviews now half a decade stale, the substance and accuracy of which respondents seek to determine. The public benefits to be gained by the disclosure of the names, as the first step in this process, falls squarely within the mandate of the FOIA.

Moreover, disclosure of the names in this case comports with both of this Court's rulings in *Rose* and *Reporters Committee* on the disclosure of names. In *Rose*, the request sought records concerning discipline at West Point, and the Court upheld the disclosure of most of the documents, including those revealing personal details much more invasive than those at issue here. The Court did withhold the names of the particular cadets involved because their indentification would be highly embarrassing and would have shed no more light on the government's activities than the released profiles of their misbehavior and the government's treatment of those incidents. 425 U.S. at 377, 380. Similarly, in *Reporters Committee*, the Court withheld the "rap sheet" on Charles Medico because it would not indicate anything about the Department of Defense, Congressman Flood, the allegations of corruption that had been made against him, or the relationship between Medico and Flood. 489 U.S. at 774. The requesters in both *Rose* and *Reporters Committee* failed to establish any logical nexus between the information sought and any public interest in monitoring government activities. It was this defect that led the Court to conclude in both cases that the public interest would not be advanced by disclosure.

The list of names sought here, however, would reveal who the government contacted in the course of monitoring Haiti's compliance with the cooperative agreement and thus provide the first step in the process of understanding government activity. Moreover, here the *only* way to check on the government's activities is by obtaining the names and asking those individuals how the United States assessed the risk which returned Haitians face. The public interest in disclosure outweighs the minimal privacy interests at stake here, regardless of how petitioner

seeks to rewrite that analysis.

C. PETITIONER'S ASSESSMENT OF THIS CASE IS FLAWED BECAUSE THE PURPOSES OF THE FOIA ARE NOT LIMITED AS PETITIONER ASSERTS.

To avoid the balancing approach discussed above, petitioner's argument redefines the relevant inquiry under Exemption 6 in two ways. First, it grafts an "anonymity requirement" onto the FOIA through Exemption 6, and second, it limits the information disclosed under the FOIA by construing language in *Reporters Committee* to require that disclosable documents "intrinsically" and "directly" indicate something about government activities. Both arguments are a distortion of the language of Exemption 6, its legislative history, and the case law regarding the privacy exemptions.

Petitioner asserts that "Congress intended" that "the fullest responsible disclosure of government records is thus achieved by permitting release of the information compiled by the government, so long as anonymity is maintained." Pet. Br. at 16. Not surprisingly, petitioner provides no support for this conclusion, because none exists. Exemption 6 and its balancing test wholly refute this notion and indeed support the release of identifying information because Congress avoided any such *per se* anonymity rule by explicitly adopting a balancing test. *See Rose*, 425 U.S. at 372, 378. *See also* 120 Cong. Rec. 17018 (1974) (remarks of Senator Kennedy) ("For example, deletion of names and identifying characteristics of individuals would in *some cases* serve the underlying purposes of exemption 6 . . . ."), *quoted in Rose*, 425 U.S. at 375 (emphasis added); *Rose*, 425 U.S. at 380, *quoting* S.Rep. No. 813 at 9 ("Exemption 6's 'clearly unwarranted invasion of personal privacy' clause is one between 'the protection of an individual's private affairs from *unnecessary* public scrutiny, and the preservation of the public's right to governmental information.'").

Moreover, none of the cases that petitioner cites in support of this stance can be read to graft an "anonymity requirement" on to Exemption 6. In neither *Rose* nor *Reporters Committee* did the Court adopt or "doubly stress," Pet. Br. at 18, an anonymity requirement. Rather, as the *Rose* Court admonished: "[w]e re-

peat, Exemption 6 does not protect against disclosure every incidental invasion of privacy -- only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy." 425 U.S. at 382. In *Reporters Committee*, the Court identified the "substantial" privacy interests at stake and then turned to "what factors might *warrant* an invasion of the interest ...." 489 U.S. at 771 (emphasis in original). Although the Court in both cases upheld the government's decision to withhold the identifying information, both the balancing process and language of both opinions, as well as two decades worth of lower court opinions, refute petitioner's assertion that "responsible disclosure" requires anonymity to be maintained in all cases.

Second, petitioner seeks to equate the *Reporters Committee* language limiting disclosure to documents which "directly" tell something about the government, with its challenge to what it calls the "derivative use theory." Pet. Br. at 21-27. Petitioner contends that, because the list of names does not "intrinsically" indicate anything about government activity, the information is not the kind that Congress sought to make available, nor is it the kind that contributes to a public understanding of government operations. By suggesting that those documents which do not facially tell of the government's activities cannot be subject to disclosure, petitioner has misread *Reporters Committee* and in so doing seeks to rewrite the relevant inquiry in Exemption 6 cases.

Ascertaining the degree of public interest in information necessarily implicates an evaluation of what the requested documents may reveal. The FOIA, however, was not limited to only those documents which on their face indicate something about the government's activities. Nothing in the Act suggests that the sum of what a requester learns about the government's activities from documents responsive to a request must be apparent in the document, nor, as petitioner contends, should disclosability depend "on the intrinsic informational value of the records." Pet. Br. at 26.[1]

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[1]Petitioner's citation of *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150-54 (1980), for the proposition that "the FOIA is not intended to facilitate access to information outside a federal agency, even where it has some relation to that agency's work," Pet. Br. at 24, is misleading. *Kissinger* concerned (continued)

In effect, petitioner asks this Court to remove from the Act's disclosure mandate any information which requires requesters to provide context, follow-up investigative research or reporting, or history to determine "what the government is up to." Pet. Br. at 19, *quoting EPA v. Mink*, 410 U.S. at 80, 105 (Douglas, J., dissenting). The case law does not support petitioner's conclusion that the light on government activities must come from the face of the document. On the contrary, both *Rose* and *Reporters Committee* turn not on how many steps or what context must be provided derivatively for the public interest -- the light shed on government -- to materialize, but whether that interest will ever materialize through the disclosure of the responsive documents.

Petitioner's position seems to confuse the inquiry of what can be gleaned about government from disclosure of the requested information with the Court's direction in *Reporters Committee* not to assess the level of public interest on the basis of how information by the *requester* is to be used. In this muddling of inquiries, petitioner concludes, erroneously, that if the document must be used to acquire other information about the government's activities, then it need not be disclosed. This cannot be the outcome of *Reporters Committee* because such a conclusion would lead to absurd results. For example, if two sets of documents, read in conjunction, would have uncovered government misdeeds, but neither individually established any conclusive wrongdoing in government activities, then under petitioner's inquiry, neither could be disclosed.

Petitioner further argues that, unless "derivative use" is rejected as a basis for supporting public disclosure, any request could be framed with this end in mind and thereby create "an exception that swallows the rule of *Rose* and *Reporters Committee*." Pet. Br. at 21. Petitioner, however, errs in suggesting that *Rose* and *Reporters Committee* established a "rule" that could be circumvented by a recasting of every request in terms that would produce information that sheds light on the government's activi-

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(...continued)
information in documents no longer in the possession or control of an agency. 445 U.S. at 154-55, not information obtained about the government from a derivative effect of disclosure of government records.

ties. As we have noted, neither case established any such proposition. Nor did they begin by evaluating the public interest of the records at issue in the abstract. Rather, both cases applied the balancing test to the facts at hand and in so doing determined that the public interest did not outweigh the privacy concerns because, in each case, the amount of information that could be gleaned about government activities, either from the primary or secondary effects of disclosure, was not sufficient to overcome the substantial privacy interests at stake. Moreover, it is no answer to argue that requesters will always seek to justify their request in terms of knowledge of government activity and thereby conclude that only direct revelations are within the scope of the FOIA, because Congress specifically told the courts to balance claims of the public interest in deciding Exemption 6 cases. Congress recognized that this mechanism placed a burden on the courts to assess the validity of those requests, "but it is not an impossible" task. *Rose*, 425 U.S. at n. 9, *citing* S. Rep. No. 813 at 3.

Petitioner's additional attack against what it calls the "derivative use theory" contends that the "theory" requires a disclosure determination to turn "upon a proposed use for the government records, rather than on the intrinsic informational value of the records," a result which "would introduce unworkable speculation and complexity into the application of Exemption 6." Pet. Br. at 26. Petitioner claims that there is "no principled basis for thrusting agencies and the courts into the analytical morass of discerning" the results to be obtained by those requesters' intentions. Yet, what petitioner essentially bemoans is the public interest in disclosure as part of the balancing test that Congress wrote into Exemption 6. Furthermore, petitioner fails to indicate why it should be any easier to determine the "intrinsic" value of documents, especially those whose contents are not revealed -- the inquiry it proposes -- than the public interest at stake in disclosure, the inquiry Congress expressly adopted and the one both lower courts applied to conclude that the public interest outweighed the privacy concerns at stake here.

Finally, petitioner contends that release of the redacted interview reports has already "provided respondents with substantive information of significance." Pet. Br. at 20. It is not, however, for petitioner to decide what is "information of signifi-

cance" or to frame or limit the ends to which a requester can learn of government activities. "[T]he purpose of FOIA is to permit the public to decide *for itself* whether government action is proper." *Washington Post Co. v. United States Dep't of Health & Human Serv.*, 690 F.2d at 264 (emphasis in original). The FOIA is designed "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *National Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). It is the public that has the right to judge what information is of significance. Nothing in *Reporters Committee* supports petitioner's tortuous reformulation of Exemption 6, nor does it alter the balancing process that has been mandated by Congress and here weighs in favor disclosure.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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